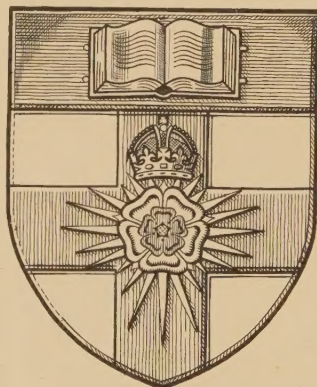


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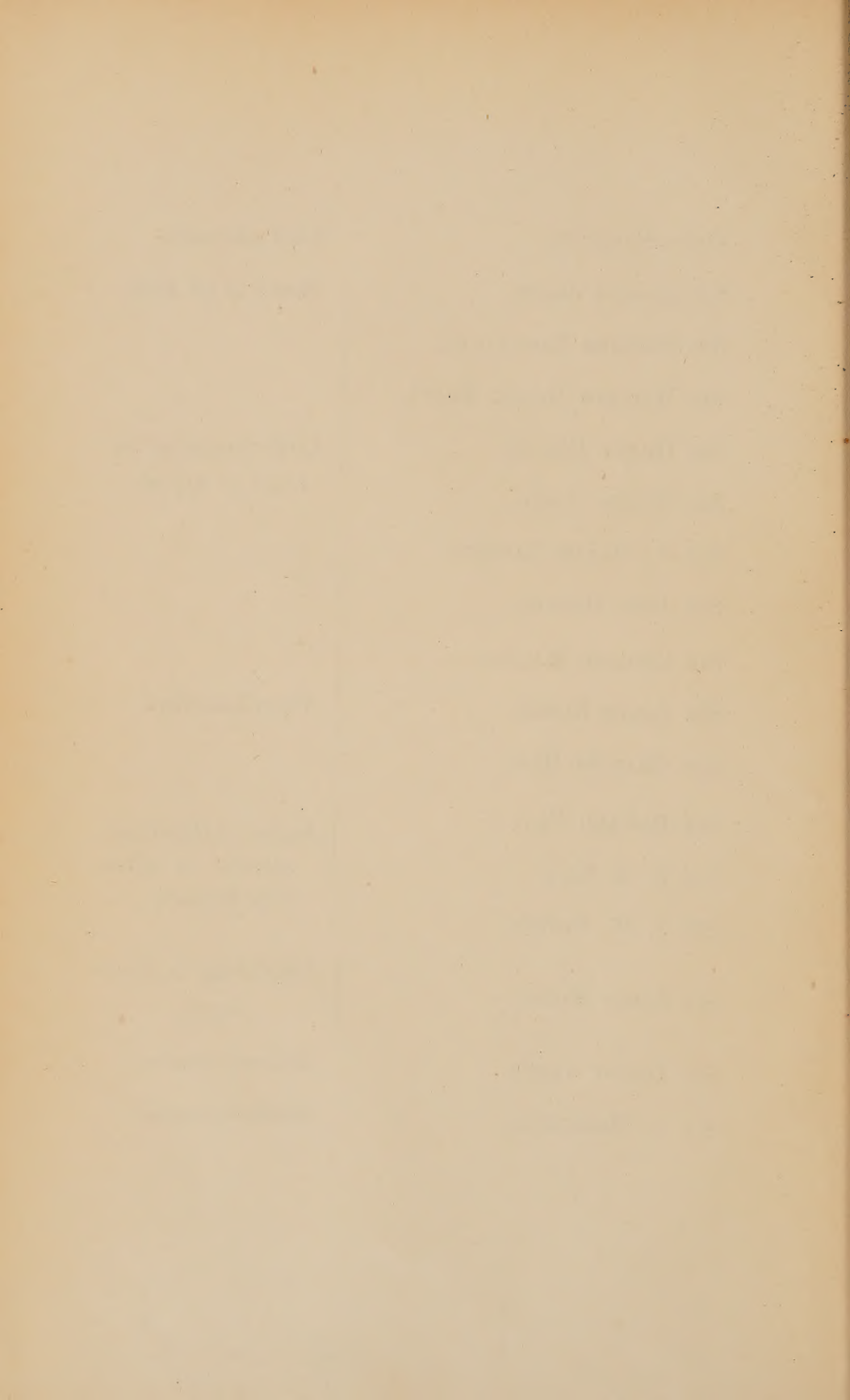
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CASES
 DETERMINED BY THE
 CHANCERY DIVISION
 AND IN
 BANKRUPTCY AND LUNACY
 AND ON APPEAL THEREFROM IN THE
 COURT OF APPEAL.

Ex parte GRAVES. *In re* HARRIS.

*Act of Bankruptcy—Debtor's Summons—Adjudication of Bankruptcy—
 Convicted Felon—Statute 33 & 34 Vict. c. 23, s. 8.*

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 Nov. 10.

Notwithstanding the provision contained in sect. 8 of the Act 33 & 34 Vict. c. 23, that every convicted felon shall, during the time while he shall be subject to the operation of the Act, be incapable of alienating or charging any property, such a convict can pay a debt which is claimed by a debtor's summons issued and served on him after his conviction, and if he fails to pay the debt within the time limited by the summons, he will commit an act of bankruptcy, upon which an adjudication can be made against him.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

In May, 1880, *George Harris*, who had been a clerk in the employment of *Henry Graves*, a publisher, was tried on the charge of embezzling money belonging to his employer, and of forgery. He was convicted, and was sentenced to seven years' penal servitude.

On the 23rd of May, 1881, after the conviction, *Graves* issued a debtor's summons against *Harris*, claiming the payment by him of the sum of £80 8s., as being money received by him in August, 1876, for the use of *Graves*, and retained by *Harris*. This summons was served on *Harris* the same day. He applied to the Court of Bankruptcy to dismiss the summons, on the ground that he did not owe the debt claimed, and his application was on the 15th of June dismissed.

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On the 23rd of June *Graves* presented a bankruptcy petition against *Harris*, founded on the debt claimed by the summons, and upon the non-compliance with the summons as an act of bankruptcy. *Harris* did not give any notice of his intention to dispute the petitioning creditor's debt or the act of bankruptcy. The Registrar, however, on the hearing of the petition, refused to make an adjudication, on the ground that no act of bankruptcy had been committed, because by sect. 8 of the Act 33 & 34 Vict. c. 23, a person convicted of felony is prohibited from alienating his property, and could not therefore pay the debt claimed by a summons served on him after his conviction. No administrator of the convict's property had been appointed by the Crown.

*Graves* appealed.

*S. Woolf*, for the Appellant:—

The Registrar appears to have thought that under the Act of 1870 (33 & 34 Vict. c. 23) (1) a creditor ought to get an interim

(1) Sect. 1: "From and after the passing of this Act, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry."

Sects. 3 and 4 empower the Court to condemn a convicted felon to pay the costs of his prosecution and conviction, and to pay compensation to any person for loss of property through the felony, and provide that the payment of such costs and compensation may be enforced against the property of the convict.

Sect. 6 defines the word convict as meaning "any person against whom after the passing of this Act, judgment of death or of penal servitude shall have been pronounced or recorded by any Court of competent jurisdiction upon any charge of treason or felony."

Sect. 7: "When any convict shall die or be made bankrupt, or shall have suffered any punishment to which sen-

tence of death if pronounced or recorded against him may be lawfully commuted, or shall have undergone the full term of penal servitude for which judgment shall have been pronounced or recorded against him, or such other punishment as may by competent authority have been substituted for such full term, or shall have received Her Majesty's pardon for the treason or felony of which he may have been convicted, he shall thenceforth, so far as relates to the provisions hereinafter contained, cease to be subject to the operation of this Act."

Sect. 8: "No action at law or suit in equity for the recovery of any property, debt, or damage whatsoever, shall be brought by any convict against any person during the time while he shall be subject to the operation of this Act; and every convict shall be incapable, during such time as aforesaid, of alienating or charging any property, or of making any contract, save as hereinafter provided."

By sect. 9 and following sections

curator of the felon's property appointed. But that is not necessary. The Act does not prevent a creditor from taking proceedings in bankruptcy against a convicted felon.

[JESSEL, M.R.:—Sect. 7 says that when any convict shall be made bankrupt he shall thenceforth cease to be subject to the operation of the Act. What is to become of the convict's property? Is he to keep it himself? What power is there to compel the Crown to appoint an administrator?]

Sect. 15 expressly reserves the legal rights of persons who have been injured by any criminal or fraudulent act of the convict.

[He was stopped by the Court.]

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the Crown is empowered to appoint an administrator of the convict's property, and provision is made for the vesting of the property in the administrator and the application of it by him in the payment of the convict's debts and liabilities and otherwise, and the re-vesting of the property in the convict or his representatives upon his ceasing to be subject to the Act.

Sect. 21 provides that, if no administration shall have been appointed by the Crown, an interim curator of the property of any convict may be appointed by justices of the peace "upon the application of any person who shall be able to satisfy such justice that the application is made *bonâ fide* with a view to the benefit of the convict or of his family, or to the due and proper administration and management of his property and affairs."

By sect. 22, "Before making any such appointment, the justice shall require the applicant to make oath that no administrator or interim curator of the property of such convict has been to his knowledge or belief already appointed; and the applicant shall also state upon oath, to the best of his knowledge and belief, who are the nearest relatives (including any

husband or wife) of such convict, and (if any such there be) where they are residing, and whether any and which of them have consented to or have had notice of such application."

Provision is made by sects. 24 and 25 as to the powers of an interim curator, and that his authority shall cease on the appointment of an administrator.

By sect. 27, "All judgments or orders for the payment of money of any Court of law or equity against such convict which shall have been duly recovered or made, either before or after his conviction, may be executed against any property of such convict under the care and management of any such interim curator as aforesaid, or in the hands of any person who may have taken upon himself the possession or management thereof without legal authority, in the same manner as if such property were in the possession or power of such convict; and all such judgments or orders may likewise be executed by writ of *scire facias* or otherwise, according to the practice of the Court, against any such property which may be vested in any administrator of the property of such convict under the authority of this Act."

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Sect. 8 prevents the convict from giving a good title to any part of his property to any one; the effect of it is to prevent him from complying with the debtor's summons, and therefore his non-compliance does not amount to an act of bankruptcy. The payment of a debt is an "alienation" of property.

[JESSEL, M.R., referred to sects. 3 and 4.]

Those sections are made "subject to the provisions of the Act."

[JESSEL, M.R.:—There is nothing to prevent the creditor from issuing execution.]

All the convict's property is to be taken possession of by an administrator in the mode provided by the Act.

[JESSEL, M.R.:—It was only intended that an administrator should be appointed in the case of a very large property.]

If the Crown does not appoint an administrator the Justices may appoint an interim curator.

[LUSH, L.J.:—That is for the benefit of the convict and his family when he has a large property.]

JESSEL, M.R.:—It is not intended to be a creditor's administration; it is to prevent other people from plundering his property while he is in prison.]

The Act was passed for the benefit of creditors. When the personal property of a felon vested in the Crown a creditor could not get execution against it. The Act was intended to give a legislative sanction to the mode in which the Crown had been in the habit of administering such property.

[JESSEL, M.R.:—Sect. 22 requires the person who applies for the appointment of an interim curator to make an affidavit who are the nearest relatives of the convict. The rights of creditors are preserved by sect. 27.]

Execution may be issued so long as the property is vested in an interim curator. The words of sect. 7, "when any convict shall be made bankrupt," are intended to apply to an adjudication of bankruptcy against a man who had committed an act of bankruptcy before his conviction. The object was to overreach an



attempted assignment of his property by a convict. Section 8 prevents the convict from paying a summoning or petitioning creditor.

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JESSEL, M.R. :—

There seems to have been some misapprehension about this matter. A convict is liable to pay his debts, and the 27th section of the Act of 1870 expressly reserves the right to every creditor to issue execution as before. If we were to listen to this argument the result would be this, that the creditor who first issued execution against the property of an insolvent convict would get paid to the detriment of the others, and that equal distribution for the benefit of all the creditors which is the theory of bankruptcy would not take place at all. It is of no benefit to the convict; if he is solvent he can get an administrator appointed, and get his debts paid. It is only in the case of insolvency that you really want to resort to proceedings in bankruptcy.

Then it is suggested that sect. 8 of the Act has made it impossible for the debtor to commit an act of bankruptcy on a debtor's summons, because it says he shall not alienate his property. What that means is plain enough—he shall not make away with his property to the prejudice of his creditors. But to infer that the Act intended that an insolvent convict should not pay his debts after his conviction is really to attribute to the Legislature an intention which ought not to be attributed unless you find it expressed in such words as would render it quite impossible to attribute any other meaning to them. Indeed the Courts have often gone further; they have declined to attribute absurdity to the Legislature even when that was the literal meaning of the words which they had used, if it was possible from the context of the Act, having regard to the proper accustomed meaning of the words, that any other meaning could be put on them. It appears to me that this appeal ought to be allowed.

LUSH, L.J. :—

I am of the same opinion. The *Felony Act* leaves a convict for felony in possession of his property just as the common law left

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a convict for misdemeanour in possession of his property. It expressly authorizes an execution against him for costs, and the only way in which he can suffer any restraint is this, that he shall not make away with his property, that he shall not allow any of his property to be improperly diverted either from his creditors or from his family. That is all. Then there are powers for the Crown to intervene for the protection of the convict and his family. Where a man has a large estate the Crown may interfere and appoint an administrator, but the rights of the creditors are in no way affected by it. An action might have been brought against the convict for this debt, and if an action may be brought, why may not a summons in bankruptcy be brought also? He is just as liable to pay as he was before his conviction. Whatever property the creditor can reach he is entitled to reach in the ordinary way by process of law. There is no reason whatever why a convict where his estate is insolvent should not be liable to the bankruptcy law like any other person.

LINDLEY, L.J.:—

I am of the same opinion. As I understand it, the reason for the decision appealed against was, that a felon is precluded by the 8th section from alienating his property, and it was considered that that prohibition extended so far as to prevent him from paying a debt. Parting with his property in payment of a debt is in one sense alienating his property. That seems to be the *ratio decidendi*. Now just let us look at that a little closer. It would be extremely hard on the felon if that was the true construction of the 8th section, because it would involve this consequence: the creditor could sue him; judgment could be got against him; a *fi. fa.* could issue upon that judgment, and, if nothing were done, that *fi. fa.* might be executed, and the costs, charges, expenses, possession money, levying fees, &c., would follow. Is it to be said that the felon is precluded by the Act from saving himself from the expenses of an execution because, forsooth, he cannot pay the amount of the judgment? Is it to be said that, because he cannot alienate his property, or charge it in the way or for the purpose contemplated by the 8th section, he cannot save himself the expense of a sheriff's officer? This would be a

cruel construction. When you come to look at the other sections of the Act which have been already alluded to, it is quite plain that the 8th section does not mean that the convict is to be prevented from paying his debts. If so, the whole argument falls to the ground. He has property, and he has power to pay his just debts. An ordinary debtor's summons is served on him, and there is no reason why he should not be made a bankrupt if he does not pay the debt.

Solicitors for Appellant: *Lewis & Lewis.*

Solicitors for Debtor: *Carr, Son, & Thornton.*

W. L. C.

*Ex parte* GLEGG. *In re* LATHAM.

*Leasehold Property of Bankrupt—Disclaimer by Trustee—Fixtures—License by Lessor to remove after Expiration of Term—Removal by Trustee before Disclaimer—Right of Lessor—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 23.*

A lease contained a proviso that the lessee, his executors, administrators, and assigns, might at any time or times during the continuance of the term, or within twelve months from the expiration or other sooner determination thereof, but not afterwards, remove any buildings or machinery which he or they might have erected on the demised premises for trade purposes. The lessee filed a liquidation petition, and the trustee in the liquidation sold the trade machinery and fixtures, which were then removed by the purchaser. The trustee afterwards disclaimed the lease:—

*Held*, by Bacon, C.J., that the removal of the fixtures was justified by the proviso in the lease, and that the trustee, notwithstanding the disclaimer, was entitled to retain the proceeds of sale.

*Held*, by the Court of Appeal, that, the disclaimer having, by virtue of sect. 23, the operation of a surrender of the lease as from the date of the appointment of the trustee, the proviso was, by construction of law, with all the other provisions of the lease, put an end to before the removal, and consequently that the removal could not be justified, and the lessor was entitled to the proceeds of sale.

BY a lease dated the 1st of July, 1875, and made between *Edward Holt Glegg*, and two others, lessors, of the first part, *Caroline Elizabeth Case* of the second part, and *John Latham* and *Thomas Latham*, lessees, of the third part, in consideration of the

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rents and royalties thereafter reserved, and the covenants and agreements by the lessees thereafter contained, a brickfield at *Platt Lane, Wigan*, together with liberty to enter, dig, and get the brick earth and clay, and to manufacture the same into bricks, and to carry away the same for the lessees' own use and benefit, was demised by the lessors to the lessees, their executors, administrators, and assigns, for the term of ten years from the 12th of November, 1874, at a certain rent of £30, and at the further rents or royalties therein specified.

The lease contained the following proviso:—

“Provided also and it is hereby agreed and declared that the lessees, their executors, administrators, and assigns, may, at any time or times during the continuance of the said term, or within twelve months from the expiration or other sooner determination thereof, but not afterwards, remove any buildings or machinery which they may have erected on the said premises for trade purposes.”

The lessees entered under this lease, and carried on the business of brick-makers on the premises, until the 17th of February, 1881, when they filed a liquidation petition in the *Wigan* County Court.

On the 10th of March the creditors resolved upon a liquidation by arrangement, and appointed two trustees.

On the 18th of March the lessors' solicitors called upon the trustees to decide whether they would disclaim the lease.

On the 9th of April the trustees sold by auction the buildings and machinery which had been erected by the lessees on the demised land, and used by them in their business of brick-makers, and the property thus sold was at once removed by the purchasers.

On the 13th of April the trustees disclaimed the interest of the debtors in the lease. The lessors then claimed the proceeds of sale, on the ground that the effect of the disclaimer was to render the previous removal of the buildings and fixtures improper, and they applied to the County Court for an order directing the trustees to pay over to them the proceeds of the sale.

The Registrar, acting as Judge, refused the application, with



costs, on the ground that, although the trustees had disclaimed the lease, they were empowered, under the proviso, to remove the trade buildings and machinery.

The lessors appealed to the Chief Judge. The appeal was heard on the 18th of July, 1881.

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*De Gea*, Q.C., and *O. L. Clare*, for the Appellants:—

The trustees can have no right to these fixtures. They have disclaimed the lease. The disclaimer makes them mere strangers. There is no principle and no authority for saying that a surrender can have any operation except upon the whole estate or interest derived under the lease: *Ex parte Stephens* (1). A part of the lessees' interest under this lease was the right to disannex the fixtures. That right has been surrendered. When a trustee in a liquidation disclaims, then by the joint operation of the disclaimer and of sects. 23 and 125 of the Act the lease is to be deemed "for all purposes" to have come to an end, on the day of the appointment of the trustee: *Ex parte Brook* (2). After a disclaimer the tenant's right to disannex his fixtures is gone; he cannot approbate and reprobate.

The effect of a surrender is to put an end to all rights under the lease. So if a parson resigns his benefice, he is not entitled to the emblements: *Bulwer v. Bulwer* (3).

In this instance the right is limited to "the lessees, their executors, administrators, and assigns." The trustee is neither of these.

[BACON, C.J.:—He is an assign in law].

He was an assign for a time; but his estate passed out of him when he disclaimed, and the cesser of his interest relates back to the date of his appointment.

*Winslow*, Q.C., and *Bardswell*, for the trustees:—

The fixtures belong to the trustees by virtue of the special contract. Every word which was said by the Court of Appeal in *Ex parte Stephens* and *Ex parte Brook* was subject to this qualification, namely, that there was no bargain respecting the

(1) 7 Ch. D. 127, 131.

(2) 10 Ch. D. 100.

(3) 2 B. &amp; A. 470.



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fixtures between the lessor and lessee. To take one instance out of several. Lord Justice *Thesiger* expressly guards himself by saying, "and there being in the agreement between the debtor and his landlords no special stipulations as regards fixtures which make this case in any way exceptional" (1). Courts of common law having held that a tenant has a right to remove trade fixtures during his term, or during a period which Baron *Parke*, in *Macintosh v. Trotter* (2), said might be considered "an excrescence on the term," the Court of Appeal in Bankruptcy refused to apply this doctrine to the possession of a trustee in bankruptcy after disclaimer. But they expressly reserved the case of a special bargain between the lessor and lessee.

In *Stansfeld v. Corporation of Portsmouth* (3), there was a covenant by the lessee to erect certain fixed machinery relating to the trade of a shipwright, and a proviso that, upon the expiration or sooner determination of the term, this particular class of machinery was to belong to the lessor, but the proviso was not to extend to "other" trade machinery. It was also provided that in the event of the lessee's bankruptcy the lessors might re-enter, and take the shipwright-building trade machinery, without paying for the same. The common law doctrines as to the right of a tenant to remove trade fixtures during the continuance of the term, and whilst he remained in possession after the determination of the term, were discussed; but the Court decided that the assignees in bankruptcy were entitled, by force of the contract between the parties, to enter for the purpose of removing the trade fixtures, "other than" the shipbuilding business fixtures, and to have a reasonable time allowed them for the purpose.

So in *Summer v. Bromilow* (4), it was decided, upon the terms of the contract, that upon the determination of a lease by re-entry for breach of covenant, the lessees had a right to take away tenant's or trade fixtures, but not landlord's fixtures, or fixtures attached to the soil.

[BACON, C.J. :—If the trustee seeks the benefit of this contract, he must pay the rent.]

(1) 10 Ch. D. 111.

(2) 3 M. &amp; W. 184.

(3) 4 C. B. (N.S.) 120.

(4) 34 L. J. (Q.B.) 130.

*11 June 1884*

*Winslow*, Q.C. :—

The trustee admits his liability to pay rent and to fulfil the covenants up to the date of his appointment.

*De Gea*, in reply :—

The remark of *Thesiger*, L.J., which has been relied on had reference to the case of contract which had been cited in the argument, namely, *Stansfeld v. Corporation of Portsmouth* (1), where the case of bankruptcy was expressly contemplated and provided for. There is nothing about bankruptcy in this proviso, and the contract does not extend to the case of bankruptcy. Failing any such special contract, whenever bankruptcy intervenes all the lessee's rights pass to his trustee, but the trustee when he disclaims the lease, forfeits all rights under it, as from the date of the order of adjudication.

BACON, C.J., after observing that the only question before him arose on the proviso, continued :—

The jurisdiction in bankruptcy is an equitable jurisdiction, and I wish it was oftener kept in mind than it is. From the origin of the bankruptcy law—from the first statute that was passed—the working out of the statutes has generally, if not universally, been committed to the Court of Chancery, and for centuries equitable principles have been interwoven into the administration of the law of bankruptcy. A good deal of the confusion, if there be any, which has arisen, was brought about by Courts of Common Law fastening upon common law doctrines and applying them to the strict construction of Acts of Parliament, so that it does unfortunately happen that decisions of the Common Law (treating them with all the respect they are entitled to, and the degree of that respect cannot be stated more strongly than I feel it) founded upon common law doctrines, have been permitted to prevail in the administration of bankruptcy.

There is one plain principle in the administration of bankruptcy, and that is, that the mere terms of the instrument of contract will not limit the power of the Court to deal with the subject-matter of it. The argument on the part of the Appellant is irresistible

(1) 4 C. B. (N.S.) 120.

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so far as it goes. It has been decided (1) that a tenant's right to remove fixtures—what is called an excrescence or “wart”—but still a Common Law “wart”—is a part of the demise—a part of the transaction between the parties, inseparable from it, and that when a surrender takes place the “wart” goes with it, and is part of the surrender as much as anything else. What has that to do with the case where the parties are cognizant of their rights, as I must assume that they were in this case, and where, keeping in view their Common Law rights as to the removal of the fixtures, they enter into the proviso which has been referred to? Is that to be treated as a dead letter? That is no excrescence—that is no fiction of the law—but a plain substantial promise come to by contract between these two parties, that in a certain event the lessee shall have a right to remove the fixtures. In the trustee in bankruptcy, or assignee as he was formerly called, every particle of interest of any sort whatever which could have been asserted by the lessee is vested. He has a right to do everything that the lessee could have done. He had a right before he disclaimed, if not before he received notice to disclaim, to avail himself of this proviso; and when afterwards he did disclaim the lease, by what operation of law, by what form of words, does he say at the same time “I relieve and surrender to you the contract you have entered into by which you say to me that I am at liberty to remove everything within a certain time?” The authorities are perfectly consistent, and the Common Law cases, within their orbit, are quite consistent. The case of *Stansfeld v. Corporation of Portsmouth* (2) was a case plainly within the jurisdiction of the Courts of Common Law. It related to the construction of the stipulations of a certain agreement which the Court construed in favour of the right of a tenant to do that which the lessor had said he should be at liberty to do, namely, to remove such articles and fixtures as were connected with the shipbuilding trade. The case which has been most relied upon is that of *Ex parte Brook* (3), in which Lord Justice *Thesiger* delivered an elaborate judgment; but it is clear that though his attention was very much fixed upon the Common Law doctrine, namely, the “excrescence upon the term” and the

(1) *Per Parke, B.*, in *Macintosh v. Trotter*, 3 M. & W. 184.

(2) 4 C. B. (N.S.) 120.

(3) 10 Ch. D. 100.

consequence of the excrescence going along with the original surrender, he had in view that there might be a contract between the parties that might prevent the operation of that doctrine. He says this (1) in terms so plain that they cannot be misunderstood. All that seems to be decided in *Ex parte Stephens* (2) is, that any severance that takes place after the date when the term is put an end to by a person who, like the trustee, is in the position of never having had any interest in the premises, must necessarily be wrongful. Is the person making the severance here a person who never had any interest, when what is taken from him is the right which was conferred upon him by the proviso? Keeping in view the same principle, Lord Justice *Thesiger*, in *Ex parte Brook* says (3), speaking of the right of a tenant to sever the fixtures and remove them within a reasonable time, "Even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy. But however that may be, we are clearly of opinion that the case of a surrender of a lease by a tenant while tenant's fixtures remain affixed to the freehold does not, either upon principle or the authority of decided cases, give any right to the tenant subsequently to remove such fixtures. At the date of the surrender they form part of the freehold, and the law has no right to limit the effect of the surrender by excluding from it that which legally passes by it, and which has not been excluded from it by the bargain of the parties." The Lord Justice, not perhaps contemplating the case before me, but speaking generally, says the doctrine applies only to cases which have not been excluded by the bargain of the parties, and the same idea is kept pointedly in view where the learned Judge says (4), "The effect, therefore, of a disclaimer generally being such as we have laid down, and there being in the agreement between the debtor and his landlords no special stipulations as regards fixtures which make this case in any way exceptional, the necessary conclusion must be that the Respondent, by disclaiming the property to which the fixtures

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(1) 10 Ch. D. 109.

(3) 10 Ch. D. 109.

(2) 7 Ch. D. 127.

(4) 10 Ch. D. 111.



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were attached, after the sale of those fixtures, constituted himself by relation a wrongdoer with respect to that sale." You cannot take that proviso out of the lease. Living or dead, active or surrendered, there is nothing which the landlord could claim on the contract; but there is a plain bargain and covenant—the proviso amounts to that—that the landlord agrees that the lessees, their executors, administrators, and assigns, may at any time during the continuance of the term, or within twelve months from the expiration or other sooner determination thereof, but not afterwards, remove any buildings or machinery they may have erected on the premises for trade purposes—not universally—but “for trade purposes.” I think the judgment of the County Court Judge is right, and that it does give effect to the proviso, which is wholly unaffected by the surrender, and which is not a “wart” or excrescence, as it has been fancifully described, but a bargain made between the parties, and a bargain which the trustee at first had a right to enforce. Having enforced it, and having subsequently disclaimed the lease, the disclaimer does not in the slightest degree affect the right which he acquired, and which has never been claimed by any one as against him.

I am of opinion that the order is quite right, and the appeal must be dismissed.

J. B. D.

C. A. From this decision the lessors appealed. The appeal was heard on the 17th of November, 1881.

*De Gex*, Q.C., and *O. L. Clare*, for the Appellants:—

The case would be exactly governed by the previous decisions of this Court in *Ex parte Stephens* (1) and *Ex parte Brook* (2), but for the proviso in the lease. But that really makes no difference, for the disclaimer amounts to an election by the trustee never to have been a tenant at all, and, therefore, he cannot exercise that which is a right given to a tenant.

[They were stopped by the Court.]

*Winslow*, Q.C., and *Bardswell*, for the trustees:—

The trustees were “assigns” of the lease, and therefore within

(1) 7 Ch. D. 127.

(2) 10 Ch. D. 100.



the words of the proviso. The license is to remove the fixtures within twelve months after the "expiration or other sooner determination" of the term. The effect of the disclaimer is to destroy the lease as from the appointment of the trustee. The license remains for twelve months afterwards. If there had been an actual surrender of the lease the license would remain for twelve months, for a surrender is a "sooner determination" of the term.

[JESSEL, M.R.:—A surrender of a lease destroys every proviso in it.]

The trustees were at one time "assigns" of the lease. The title of a trustee in a liquidation to the property of the debtor relates back to the commencement of the liquidation, and the debtor's property vests in him from that time: *Bankruptcy Act*, 1869, ss. 11, 15, 17, 125.

[JESSEL, M.R.:—Then he would be liable to be sued retrospectively on the covenants in the lease as an assign. That is not the intention of the Act. The property in a lease vests in the trustee from and after his appointment, and by his disclaimer it is got rid of *eo instanti*.]

If that is so, then between the commencement of a bankruptcy and the adjudication there is no owner of the lease.

[JESSEL, M.R.:—The bankrupt is the legal owner till the adjudication, and could be sued on the covenants. The intention of the Act is to relieve the trustee, by his disclaimer, from all liability under the lease; we must not make nonsense of it. The lease only vests on the adjudication.]

The observations of Lord Justice *Thesiger* in *Ex parte Brook* (1) shew that the decision was limited to cases in which there was no special stipulation between the landlord and the tenant with regard to the fixtures excluding the application of the general rule. The proviso in the present case amounts to such an exception.

JESSEL, M.R.:—

This appeal is from a decision of the Chief Judge affirming the

(1) 10 Ch. D. 111.

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previous decision of the County Court Judge, and I need not say that it is deserving of very respectful consideration at our hands, and I should have had more hesitation in reversing the decision without hearing a reply, if the point upon which we are about to decide the case had appeared to have been considered by the Chief Judge. It does not, however, seem to have been present to his mind at all, for it is not referred to in his judgment. The landlord says, The effect of the trustees' disclaimer is to make the previous removal of the buildings and fixtures wrongful, though I could not, at the time of the removal, say that it was unlawful. Whether he is right in this contention or not depends upon the construction of sect. 23 of the Act, which says that, upon the execution of a disclaimer of a lease of the bankrupt, the lease "shall be deemed to have been surrendered from the date of the order of adjudication," and, in the case of a liquidation by arrangement, the appointment of the trustee corresponds to the adjudication in a bankruptcy. What follows from this? The lease is to be deemed to have been surrendered on a prior day. A surrender of the lease must be a surrender of the whole lease, not merely of the demise, but also of the license to remove the buildings and fixtures, and of every provision in it, whether beneficial to the tenant or onerous. The whole lease is gone. If this be so, it is impossible to justify an act which was done under a license which had ceased to exist before the act was done. The appeal must therefore be allowed, and it must be declared that the Appellants are entitled to the proceeds of sale.

BAGGALLAY, L.J. :—

I am of the same opinion. I am unable to distinguish between the present case and *Ex parte Stephens* (1) and *Ex parte Brook* (2). The suggested distinction by reason of there being a proviso that the lessees may remove the fixtures, really amounts to no distinction at all. On the execution of the disclaimer the proviso fell with the lease.

LUSH, L.J. :—

I am of the same opinion. The words of sect. 23 make it plain

(2) 7 Ch. D. 127.

(3) 10 Ch. D. 100.

that by a "surrender" is meant an entire surrender of the lease—a cesser of the relation of lessor and lessee. I never heard of such a thing as a surrender of a part of a lease; the entire relation of landlord and tenant is dissolved. It is true, as was held in *Ex parte Walton* (1), that sect. 23 deals only with the relations between the trustee and the lessor, but still its object was to relieve the trustee from all liability under the lease. It follows that when the disclaimer is executed there is an entire end of the relation of lessor and lessee as if it had never existed.

Appeal allowed with costs.

Solicitors for Lessors: *Gregory, Rowcliffes, & Co.*, agents for *Scott & Ellis, Wigan*.

Solicitor for Trustees: *C. M. Barker*, agent for *R. Stuart, Wigan*.

W. L. C.

JOHNSTONE v. COX.

[1879 J. 134.]

Appeal for Costs—Mortgage Suit—Costs of Appeal on Cross Notice—Priority of Charge—Gazetting Retirement of Officer.

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After receipt by the army agents of the money payable to an officer on his retirement continual notices of charges on the money were given to the army agents by each of three assignees. One of the assignees brought an action against the two others, claiming priority over them:—

Held, by *Bacon, V.C.*, that the notices given before the retirement was gazetted were of no avail, and that of the two assignees who gave notice on the day after the retirement was gazetted the Defendant whose security was prior in date had priority over the Plaintiff and over the other Defendant, and that the costs of the action were to be paid out of the fund.

The Defendant who had obtained priority appealed as to the costs, and the other Defendant gave notice of cross-appeal on the merits:—

Held, that an appeal would lie from the order as to costs. Order as to priority affirmed, but the costs of action ordered to be added to the securities. Appellant's costs of appeal to be paid in moieties by the Respondents.

THE Plaintiff brought this action in order to establish the priority of his charge upon money paid by the Army Purchase

(1) 17 Ch. D. 746.

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Commissioners to *Cox & Co.*, as the sum due to an officer on his retirement. The Vice-Chancellor *Bacon* decided that *Kayler*, another incumbrancer, had priority over the Plaintiff and over a third incumbrancer, the liquidation trustee of persons named *Price & Co.*, but directed the costs of all parties to be paid out of the fund.

Kayler appealed against so much of the judgment as directed payment of costs out of the fund, and notice was given by the trustee of *Price & Co.* that he should contend against the judgment giving priority to *Kayler*. The facts of the case are stated in the report of the case before Vice-Chancellor *Bacon* (1); on the appeal the following facts were specially relied upon: that *Price & Co.* had deposited their mortgage deed with *Cox & Co.*, who kept it, and that the officer did not sign the receipt for the money until the 27th of June, 1879, one of their notices having been the first after that day.

Hemming, Q.C., and *Jason Smith*, for *Kayler*, on the appeal as to costs:—

We succeeded below on the sole question in dispute, namely, the priorities, and as our debt largely exceeded the fund, the decision was that the fund was ours. Nevertheless the order appealed from directs that the costs of our defeated opponents should be paid out of our fund. Such a case is not within the Rules of Court, 1875, Order LV., rule 1: *Farrow v. Austin* (2).

Grosvenor Woods, for the Plaintiff:—

No doubt the Court cannot order a successful plaintiff to pay costs, but it is usual to give the plaintiff his costs in cases where he recovers the fund for the benefit of all the incumbrancers: *Ford v. Earl Chesterfield* (3).

[*Morgan & Davey* on Costs (4), and *Wright v. Kirby* (5), were also mentioned.]

Horton Smith, Q.C., and *Northmore Lawrence*, for the assignee of *Price, Boustead, & Co.*

(1) 16 Ch. D. 571.

(2) 18 Ch. D. 58.

(3) 21 Beav. 426.

(4) Page 157.

(5) 23 Beav. 463.

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JESSEL, M.R. :—

Messrs. *Cox & Co.* had £500 in their hands which they owed to an officer. The officer had made divers assignments by way of mortgage or charge on that sum, and the incumbrancers disputed between themselves as to who was entitled to priority. Messrs. *Cox & Co.* said, "We cannot pay any of you," and they might, if they had liked, have themselves instituted a suit. Instead of that, one of the incumbrancers instituted a suit claiming the money, and making the others Defendants. One of these Defendants succeeded by the order of the Vice-Chancellor in establishing his prior right to the money. The result, therefore, was that the Plaintiff's claim turned out to be unfounded, and the claim of the Defendant, the present Appellant, turned out to be well founded. But then the costs of that litigation had to be disposed of. Of course if it had been an ordinary litigation, the man who brought forward an unfounded claim would have had to pay for it; and if Messrs. *Cox & Co.* had brought an interpleader action the unsuccessful party would have been compelled to pay the costs. That would have been the natural course of justice, and is the course of justice in every Court—the losing party pays the costs. But there is an exception in the case of incumbrancers. As an ordinary rule, the costs of incumbrancers are allowed to be added to their securities if any difficult questions arise as to the priority of incumbrancers, and so on; and unless there has been something vexatious or something unusual in his conduct, the incumbrancer gets his costs if the fund is sufficient to pay them. The only hardship he has to endure is, that if he has taken a security on an insufficient fund he may lose both debt and costs, and that rule has been acted on for years by the Court; I see no reason for departing from it, and therefore the costs of each incumbrancer must be added to his debt.

The result of supporting this order would be somewhat remarkable if, as it is suggested might happen in the present case, it would have the effect of sweeping away the entire fund, which of course would be a parody on the administration of justice.

BAGGALLAY and LUSH, L.JJ., concurred.

The appeal on behalf of *Price & Co.* was then heard.

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The cases relied upon in the Court below were before the recent regulations.

[BAGGALLAY, L.J.:—Is not this covered by *Roxburghe v. Cox*? (1).]

No doubt the officer could not get the money until his retirement was gazetted, yet as soon as the money was paid to *Cox & Co.* his title was clear. The money was then earmarked, and *Cox & Co.* were bound by the notice given. Besides, *Price & Co.* actually deposited their deed with *Cox & Co.*, who had therefore continual notice. Lastly, the money was not actually payable until the officer has signed the receipt and *Price & Co.* gave notice directly after that.

Hemming mentioned on that point *Addison v. Cox* (2).

JESSEL, M.R. :—

This is an appeal from the decision of the Vice-Chancellor *Bacon*, and it really attempts to raise (and I am not surprised at it, because the Appellant no doubt felt himself in a position of hardship) several points so minute and so trivial as to be insufficient to distinguish the case from the prior decisions, especially that of *Roxburghe v. Cox*, before the Court of Appeal (1). Until the officer is gazetted out of the army, the money paid by the Army Purchase Commissioners on his account to *Cox & Co.* does not belong to him; but it does belong to him when he is gazetted out. The result is that the notices given to *Cox & Co.* before that time are futile. They are not debtors to the officer, and you cannot give notice to a man so as effectually to bind him when no debt is owing by him, though it may become so afterwards. That being so, all the prior notices went for nothing.

But then it is suggested that notice was actually given after the money was paid by the Army Purchase Commissioners and before the gazetting. The answer is that the payment of the money by the Army Purchase Commissioners does not make it

(1) 17 Ch. D. 520.

(2) Law Rep. 8 Ch. 76.

less their money until the gazette comes out; it was theirs beforehand, and, therefore, this case is entirely within the previous decisions. Another point is taken, that when one incumbrancer gave his notice of assignment he sent his deed to *Cox & Co.* and they did not return it. If the notice of assignment came to nothing, the deed came to nothing, and there is no such thing as a notice repeating itself until the gazette is issued. That disposes of the second point.

Then there was a third point which I did not quite follow, which was, that because the officer had not signed the receipt for the money which was his, that the notice to the debtor was not valid. I am not able to follow that line of argument, and it appears to me that the decision of the Vice-Chancellor ought to be affirmed.

BAGGALLAY and LUSH, L.JJ., concurred.

The Appellant *Kayler* having succeeded in his appeal as against the Plaintiff, and the cross-appeal on behalf of *Price & Co.* having failed, the Plaintiff and the trustee of *Price & Co.* (there being no question as to the solvency of either) were ordered each to pay one-half of *Kayler's* costs of the appeal. //

Solicitor for *Kayler*: *S. Scott*.

Solicitors for Plaintiff: *Dod & Longstaffe*.

Solicitors for the trustee of *Price & Co.*: *Hollams, Son, & Coward*.

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(1/ See Harrison's Commercial & Financial
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LAIRD v. BRIGGS.

[1879 L. 148.]

Easement—Prescription Act (2 & 3 Will. 4, c. 71), s. 8—“Person entitled to any Reversion”—Building Agreement by Tenant for Life—Foreshore—Amendment of Pleadings—Practice.

In an action to restrain the removal of shingle from, and the placing of bathing-machines upon, a part of the foreshore of the sea at *M.*, the Plaintiff claimed to be tenant in possession of the *locus in quo* under a building agreement granted him by the lord of the manor of *M.*, who was tenant for life of the property under a settlement. By his statement of defence the Defendant set up a forty years' uninterrupted user and enjoyment of the *locus in quo* by himself and his predecessors in title for the purposes complained of, and denied that the Plaintiff was or ever had been in possession of the *locus in quo* “save subject to the right of the Defendant.” At the trial, *Fry, J.*, refused the Defendant leave to amend his statement of defence by striking out the qualifying words, so as to make his denial of the Plaintiff's possession an unqualified one:—

Held, on appeal, that the amendment ought to have been allowed.

Golding v. Wharton Saltworks Company (1) explained.

Held, also, per *Fry, J.*, that the words “person entitled to any reversion” in the 8th section of the *Prescription Act* (2 & 3 Will. 4, c. 71) included a person entitled as a remainderman; that the Plaintiff, being in possession of the *locus in quo* under the agreement at least as tenant at will to the reversioner, was also a person “entitled to any reversion” within the section, and could therefore maintain the action.

But *held*, by the Court of Appeal, 1. That on the true construction of the building agreement the Plaintiff had no estate whatever in the *locus in quo*, but only a right of entry thereon for the purposes of that agreement, and therefore could not maintain the action; 2. That it was, therefore, unnecessary to decide the question raised on the 8th section of the *Prescription Act*; but their Lordships intimated that it must not be concluded that they agreed with the decision of the Court below on that point.

THIS was an appeal from a decision of Mr. Justice *Fry* (2).

Under an agreement dated the 1st of May, 1876, and made between *Francis Nathaniel* Marquis of *Conyngham* of the one part, and *Mark Sanderson* of the other part, and of an assignment dated the 13th of March, 1877, and made between *Sanderson* and the Plaintiff, the Plaintiff claimed to have been in possession as tenant of so much of the foreshore of the manor of *Minster*, in

(1) 1 Q. B. D. 374.

(2) 16 Ch. D. 440.

Kent, as extended from the eastern end of the *Margate Aquarium* to the northern side of *Broadstairs Pier*, and of the rights of the Marquis (except wreckage and groundage) in and over such foreshore. At the date of the agreement the whole of the foreshore above mentioned formed part of the manor of *Minster*, and the Marquis was seised of the manor, including all the foreshore, for an estate for life in possession. The Marquis died on the 17th of July, 1876, and on his decease his eldest son, the present Marquis, became seised of the manor for an estate for life. The Plaintiff alleged that he was in possession of the foreshore in question as tenant of the present Marquis upon the terms of the agreement, and that the Defendant and his servants and workmen had wrongfully entered upon the foreshore, and had carried away therefrom large quantities of sand, shingle, and chalk, and had also placed and continued on such foreshore bathing-machines, to the damage and without the leave of the Plaintiff. The Plaintiff claimed damages for the wrongs complained of, and an injunction to restrain the Defendant from any repetition of the acts complained of, and from causing or allowing bathing-machines to remain on the shore.

The statement of claim was delivered on the 17th of July, 1879.

The Defendant, by his statement of defence, said that in 1824 *John Boys*, since deceased, was entitled to an estate in fee simple in possession in certain lands at *Margate*, a portion of such lands being immediately adjacent to and bounded solely on the north side thereof by a part of the foreshore with regard to which the Plaintiff claimed relief. The Defendant said that he had never, nor had any one through whom he claimed, so far as he was aware, done any of the acts complained of by the Plaintiff, except upon such part of the foreshore as lay immediately adjacent to the said property. The Defendant said that in 1824 and the five following years, *John Boys* constructed at a large outlay on the above-mentioned property certain buildings and works which were known as the *Clifton Baths*, and (among other things) levelled the shore between low-water mark and the cliffs, so as to make it available for the purpose of bathing, and made a roadway along the shore, by which bathing-machines could be drawn backwards and forwards, and executed a great number of improvements upon

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the *Clifton Baths* property and the foreshore fronting the same. The works were completed in the year 1829. The Defendant said that "Ever since the last-mentioned year the foreshore opposite to the *Clifton Baths* property has been uninterruptedly used by the owners and tenants thereof for the time being for the purpose of a sea-bathing establishment, and additional works have been from time to time constructed upon it. Ever since the year 1829 bathing-machines have been placed upon it, and drawn backwards and forwards as required for the purposes of the business, and large quantities of sand, shingle, and chalk have been constantly removed for the purpose of keeping the said foreshore in order for such purpose. No interruption has ever been made nor any remonstrance offered by any one in respect of any such things done upon the said foreshore until the Plaintiff commenced the present action."

The Defendant further said that in the year 1869 the *Clifton Baths* property was vested for an estate in fee simple in possession in one *J. H. Boys*; that on the 6th of February, 1869, he conveyed the property in fee simple to *T. D. Reeve*, who died on the 26th of April, 1875; and that the Defendant was the tenant of the trustees of the will of *Reeve*, and as such entitled to exercise all the rights belonging to the trustees in respect of the *Clifton Baths* property and the foreshore fronting the same. The Defendant (by paragraph 9) denied "that the Plaintiff is now or ever has been in possession of so much of the foreshore of the manor of *Minster* as lies opposite the *Clifton Baths* property, save subject to the rights of the owners of the *Clifton Baths* property and their tenants over and upon such foreshore," and he made a similar denial with respect to the title of the Marquis *Conyngham* to the foreshore opposite the *Clifton Baths* property at the date of the agreement of the 1st of May, 1876.

The Defendant denied that he, or any one so far as he was aware, had wrongfully (though he admitted that he had without the leave of the Plaintiff) entered upon the said foreshore, or done any of the acts complained of by the Plaintiff. And the Defendant claimed (by paragraph 11) the right, on behalf of himself and the trustees of *Reeve's* will, who were entitled to an estate in fee simple in possession of the *Clifton Baths* property, to enter

upon the foreshore fronting that property, and to place and keep bathing-machines thereon, and to carry away therefrom such quantities of sand, shingle, and chalk as might be necessary for the purpose of keeping such foreshore in order for the purpose of sea-bathing, and for the beneficial enjoyment of the *Cilfton Baths* property.

By his reply the Plaintiff joined issue on the Defendant's denial of his possession and of the title of the Marquis, and denied the rights claimed by the Defendant, and the Plaintiff submitted that if the Defendant or his trustees had acquired any right by user or otherwise over the foreshore (which the Plaintiff denied), the same was acquired during the period in which *Henry Marquis Conyngham*, deceased, and *Francis Nathaniel Marquis Conyngham*, deceased, were respectively tenants for life of the manor of *Minster*, of which the foreshore formed part, and that no right had been acquired as against the present Marquis, or the Plaintiff as his tenant; and the Plaintiff pleaded, if necessary, the *Prescription Act* (2 & 3 Will. 4, c. 71).

The present Marquis was tenant for life of the manor.

The action came on for trial before Mr. Justice *Fry* on the 14th of December, 1880 (1), when his Lordship refused leave to the Plaintiff to amend his statement of defence by striking out the qualifying words, so as to make the denial of the Plaintiff's possession an absolute one, and held that the words "person entitled to any reversion," in the 8th section of the *Prescription Act* (2), included a remainderman; and, therefore, that the Plaintiff, being in possession of the *locus in quo* under the agreement at the least

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(1) 16 Ch. D. 440.

(2) Sect. 8: "Provided always, and be it further enacted, that when any land or water upon, over, or from which any such way or other *convenient* watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or for any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before

mentioned, during the continuance of such term shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof."

It has been suggested that the word "convenient" above placed in italics is a misprint for "easement."

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as tenant at will of a reversioner, also came within the words "person entitled to any reversion," and could therefore maintain the action; and granted an injunction accordingly.

The Defendant appealed. The appeal was heard on the 26th of July, 1881.

North, Q.C., and *T. Brett*, for the Appellant:—

The building agreement gives the Plaintiff no title to the *locus in quo*, even assuming the Defendant is a wrongdoer. It does not operate as a demise, but only as a tenancy at will in respect of the pieces of land on which houses were being built. It creates no tenancy whatever in respect of the pieces of land on which no houses were being built, but only confers a license to enter and build. The Plaintiff therefore has no estate whatever to support his title. Apart from the *Prescription Act*, we have acquired an easement to draw bathing machines across the foreshore fronting our premises by forty years' uninterrupted enjoyment, and we have done this with the knowledge of the present Marquis and his predecessors in title. We asked leave to amend at the trial for the purpose of setting up this right, and we submit the amendment should have been allowed: *Tildesley v. Harper* (1); *Newby v. Sharpe* (2). It is said that our case is within the 8th section of the *Prescription Act*, and that this action is a resistance to the Defendant's claim, and is brought within three years of the cesser of the last life interest. But we are not within the section unless the word "convenient" be read "convenience" or "easement"; and we submit the Court has no power to alter the wording of an Act of Parliament. No doubt Lord *St. Leonards*, in his comments on the section in his work on Real Property Statutes (3), suggests that the word "convenient" may be read "easement," and in *Gale on Easements* (4) Baron *Parke* is quoted to have said in *Wright v. Williams* (5): "No doubt there is a mistake in the 8th section, probably a miscopying in the insertion of the word "convenient" for "easement"; but in neither of those reports of that case is any such *dictum* to be found.

(1) 10 Ch. D. 393.

(4) 5th Ed. p. 184.

(2) 8 Ch. D. 39.

(5) 1 M. & W. 77, 99.

(3) Sugden's Real Property Statutes, 2nd Ed. p. 180.

[JESSEL, M.R.:—The Court cannot change the words of the statute in the manner suggested.]

Even if the word “convenient” be read “easement,” then we say that the Plaintiff is not a reversioner. A remainder is not the same as a reversion. The Act is highly technical in its expressions and character, and must be construed strictly. The Plaintiff claims under a remainderman, and has no better title. But even if he is a reversioner, still we say there has been no resistance to our claim within three years after the cesser of the life estate. By his original statement of claim, the Plaintiff claimed, not as a reversioner, but under a paramount title acquired under the building agreement. Then, by amendment, he puts forward another case, which we admit is resistance, but that resistance dates only from the amendment, which was made more than three years after the death of the late Marquis, and therefore the resistance is too late: *Daniell’s Chancery Practice* (1); *Long v. Burton* (2).

Even if the present Marquis is a reversioner, and the Plaintiff sufficiently represents him, and the action is not out of time, still the action cannot be maintained. Bathing on the foreshore is, we submit, the Common Law right of all Her Majesty’s subjects, and if the Crown could not make a grant in derogation of that right to the predecessors in title of the present Marquis, neither could the latter do so: *Attorney-General v. Tomline* (3); *Blundell v. Catterall* (4).

Lastly, on the balance of convenience and inconvenience, the Plaintiff here has too slight an interest to support a perpetual injunction without the owner being made a party to the action: *Jones v. Chappell* (5). Here, a Plaintiff with a minimum of interest seeks to obtain a maximum of result, and that without the concurrence of his landlord. The landlord is now too late, and the Plaintiff is clearly outside the statute.

Cockson, Q.C., and *W. W. S. Follett*, for the Respondent:—

As to the amendment, the Defendant does not state what amend-

(1) 5th Ed. p. 330.

(2) 2 Atk. 218.

(3) 15 Ch. D. 150.

(4) 5 B. & A. 268.

(5) Law Rep. 20 Eq. 539.

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ment he requires. If he wishes to assert now an adverse possession for forty years against all the world, that is setting up an entirely different title and an entirely new claim, which he must set up by a separate action. If he asks for the amendment refused by Mr. Justice *Fry*, he is appealing on a question of discretion, and the Court of Appeal will not overrule the discretion of the Court below unless serious injustice would result from that decision: *Golding v. Wharton Saltworks Company* (1); *Swindell v. Birmingham Syndicate* (2).

[JESSEL, M.R.:—I take it that every injustice is serious, and that the use of that word by Lord Justice *James* in *Golding v. Wharton Saltworks Company* simply means that the Court of Appeal will not interfere in a trivial matter.]

The Defendant is not now entitled to raise by amendment an entirely new case. It is admitted on the statement of defence that under the building agreement we are entitled to the possession of the foreshore for certain purposes. Even if the amendment be allowed, we can prove possession and acts of ownership over the *locus in quo*—such as the taking of sand and shingle—under the agreement and the payment of the rent.

[JESSEL, M.R.:—You do not shew possession in yourselves.]

We submit we do. Under the agreement all the “rights” of the Marquis passed to us; that would include possession.

[JESSEL, M.R.:—But even that is hardly sufficient. You are only entitled to a right of entry for the purposes of the agreement, and to leases of the building sites when the land has been reclaimed and marked out for building by the landlord’s surveyor. You have no title to this particular piece of the foreshore as a building site.]

If so, and the objection had been taken in the Court below, we might have amended our writ by making the present Marquis a co-plaintiff.

[JESSEL, M.R.:—You are too late. The three years have run, and the writ cannot now be amended.]

We must admit that no sites on the *locus in quo* have been set

(1) 1 Q. B. D. 374.

(2) 3 Ch. D. 127.

apart for us to build upon. If the amendment be allowed, we cannot carry the case further.

JESSEL, M.R. :—

This is an appeal from a decision of Mr. Justice *Fry*. The first point decided by him was, that he ought to refuse leave to amend to the Defendant to the extent of striking out a qualification from the statement of defence as regards the possession of the Plaintiff. Now, it appears to me that, with a view of trying the real question between the parties, the amendment ought to have been allowed. The case as between the Plaintiff and the Defendant raised merely two issues; one issue was the title of the Plaintiff to sue the Defendant at all; the second was the title of the Defendant to the easement he claims by virtue of the statutory right. Now, if the Plaintiff had no right to sue the Defendant at all, that would appear either upon the admitted facts or on the facts which the Defendant's counsel would state he was prepared to prove; and the result of proving that statement would be that the Plaintiff would entirely fail. It seems to me, therefore, it would not be right to refuse the Defendant leave to amend with the view of trying that question. The Plaintiff is not prejudiced, because, having stated what he can prove, if the Court is of opinion that that is not sufficient he is not injured at all; and, on the other hand, if we allow the Defendant to be fixed by what is not really an admission, except by the strictest rules of interpretation, it will deprive him of his property altogether. As I said before, I think the amendment should be allowed, and the Plaintiff should be put to shew that he has a title, because I am by no means convinced that there ever was a case in which the Court of Equity or the High Court has interfered on behalf of a plaintiff simply in possession who had no title to that possession. Passing from that, I come to examine the Plaintiff's right. The case, no doubt, is one of very great singularity. It seems that Lord *Conyngham* is lord of the manor of *Minster*, which includes a very great extent of foreshore near to and opposite *Margate*. It appears that the Defendant and his predecessors in title have got a bathing establishment, and that they have for more than forty years past been in the habit of drawing

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their bathing-machines to and across the foreshore opposite the bathing establishment to the sea for the purpose of allowing their customers to bathe; and the question is whether the Plaintiff, deriving or alleging that he derives title from the Marquis of *Conyngham*, can prevent the continuance of that user. The learned Judge in the Court below has given judgment in favour of the Plaintiff, and has granted the injunction upon the ground that he is in lawful possession, with a right to the possession of the piece of land in question. We have to decide whether that decision is well founded. Now, the really material point to be decided is, whether the Plaintiff has a right to the possession of the *locus in quo*. Assuming that the Marquis of *Conyngham* has such a right, what the Plaintiff alleges is, that by an agreement with one *Sanderson* made by the late Marquis of *Conyngham* (who was tenant for life), on the 1st of May, 1876, *Sanderson* acquired the right of possession of the foreshore, including of course the piece of foreshore in question; that he, the Plaintiff, is the assignee of *Sanderson*; that on the death of the Marquis of *Conyngham*, who granted the lease, the present Marquis became entitled as the eldest son, and has in some way or other affirmed the agreement made by the late Marquis, which was not binding upon him, because the late Marquis was only tenant for life. The first question to be decided is, whether the agreement gave *Sanderson* any title to the foreshore in question; because if *Sanderson* had no title, the Plaintiff has no title. That, of course, is a question of construction. Now I will first of all state what I consider to be the meaning of the agreement in a few words, and then I will consider it a little more in detail. It seems to me to be what is called an ordinary building agreement, not quite an ordinary building agreement as regards the works to be done, but an ordinary building agreement in the sense that the builder has to construct roads and build houses. The substance of it is, that he is to embank the foreshore, to make a sea-wall, to reclaim some land from the sea to lay out what appears to be a very handsome promenade—a carriage drive along the seashore—and to build houses upon sites to be marked out by the Marquis's surveyor, and obtain leases of those houses, and until the leases are granted he is to pay £50 a year. That is the substance of the

agreement. Now if that is so, the Plaintiff would have no title to the possession of any part as tenant—except the sites for building. He would have a right of entry, as any other workman would have, for the purpose of constructing the roads and making the embankment; but that, of course, does not give him possession, any more than the master builder or the bricklayer, who is building houses for a man upon his own land, has the right of possession. He has a mere license to enter to construct the roads in the ordinary way that a builder would make roads, but he has no title or interest whatever in the roads. He has a mere right of way over them which is attached to the houses which he agrees to build.

That is my view of this agreement. I will now read a few words in corroboration of that. In the first place, the then Marquis of *Conyngham* is called “the landlord” and *Sanderson* is called “the tenant.” That is the definition clause which we commonly find, but it does not throw any light upon the agreement, because there is in any event some land to which these terms apply. The first clause, upon which the Plaintiff founds his case, is this, “The tenant shall be entitled to all the rights of the landlord (except those of wreck and groundage) in and over so much of the foreshore of the manor of *Minster*, in the county of *Kent*, as extends from the eastern end of the site of the *Margate Aquarium* to the north side of *Broadstairs Pier*, and, for the purpose of constructing the works and buildings in the manner and to the extent hereinafter stipulated, may enter upon the same.” It is said that the word “rights” includes the land itself. No doubt the word “rights” is in itself ambiguous. You cannot say whether it was intended to grant an easement or intended to grant the land; but in a legal agreement the word “rights” in land is not the term used for the grant of land. *Primâ facie*, therefore, you would imagine that it was not intended to grant the land; but it appears to me that is made quite clear by the later words, which give a right of entry to a limited extent. This, beginning with a right of entry, shews that it was not intended to pass the land by the first words. Now let us look at the next clause. “He will at his own expense form an embankment on the foreshore and keep the same in repair.”

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Then, "at his own expense he will lay out and form on the embankment a carriage drive and promenade in a substantial manner, and streets." Then, "so much of the land to be reclaimed by the tenant as may be required by the said surveyor"—that is, the surveyor of the landlord—"shall be reserved for building sites and for gardens, yards, and courts to be enjoyed with any buildings to be erected in pursuance of these presents." Then the 6th clause explains that the tenant is to build a certain number of houses. That varies a little from the 7th clause, which is a special clause as to building. Then the 11th clause is, "Until a lease or leases shall have been granted in pursuance of the agreement for that purpose hereinafter contained of the whole of the land hereby reserved for the building sites (subject to such alterations or additions as are hereby permitted to be made) the tenant will pay to the landlord during the life of the landlord, and after his death to the person or persons entitled to the premises in remainder, the several yearly rents following" which are mentioned. They are obviously rents for building sites. And then, in the 20th clause, we find this: "These presents are intended to operate, and shall operate, as an agreement only, and not as an actual demise of the several parcels of land hereby agreed to be demised"—that is, only as to building sites—"or the buildings thereon to be erected, and shall not give the tenant any legal interest in the said parcels of ground respectively until the leases thereof respectively shall be executed, except so far as to create a strict tenancy at will on the part of the tenant upon the terms aforesaid, and to entitle the landlord, or other the reversioner, to the like power and remedy by distress or otherwise for the recovery of the rent or respective rents." Now that clause means this, that the words shall not operate to be an actual demise of the building sites, but he shall be tenant at will of the building sites. There is no tenancy at will created in any of the roads or embankments, or of the drives, or anything of that sort. Therefore, it appears to me there is no right in the Plaintiff whatever to possession as tenant of anything except the building sites; and even as to the building sites, he has no right to take possession of them until the surveyor has pointed them out or specified them as required by the agreement, which it is admitted on the part of the Plaintiff has not yet

been done. In fact, it could not be done until the buildings had been erected on the parts reclaimed, and the reclamation has not yet taken place. Consequently, it appears to me that under the agreement there is no right of possession in the tenant of anything; and consequently it is plain, whatever the meaning of the word "reversion" may be in the 8th section of the *Prescription Act*, this Plaintiff is not a reversioner. This Plaintiff, therefore, has no right or title whatever to sue the present Defendant in this action, or in any other action for a similar purpose. Therefore, it seems to me the appeal should be allowed, because the Plaintiff has no title to the possession of the *locus in quo*, and I need hardly add that he has not taken possession. The only fact which Mr. *Cookson* said the Plaintiff would prove would be, first, that he had taken some sand or shingle from this and other parts of the foreshore; secondly, that he paid the rent of £50 by his agent. But that is not proof of possession. That being so, the action of course should be dismissed. But, before parting with the case, I think it right to make one or two observations upon the 8th section of the *Prescription Act*, because I do not wish it to be understood that I take the same view of the law as that taken by the learned Judge in the Court below. At the same time I do not wish it to be understood that I give any final decision to the contrary.

There are two points upon the 8th section which appear to me to deserve very serious consideration. The first is, whether we can alter the word "convenient" in the second line by putting in the word "easement" instead. That is a question which appears to me to be one of very considerable difficulty. A Judge may take the view that the 8th section as it stands is so absurd that the word "convenient" cannot stand there, but that does not quite conclude the question as to whether you can insert another word. A Judge may take the view that there is sufficient in the 8th section and some of the following sections to enable him to insert another word. All I wish to say is, that I think the question is open for discussion, and it must not be treated as concluded by the judgment of Mr. Justice *Fry* upon the point. The other is a very serious question indeed. The concluding words of sect. 8 are, "in case the claim shall within three years next after the end

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or sooner determination of such term," that is, term of life or term of years, "be resisted by any person entitled to any reversion expectant on the determination thereof." The whole of the section and the whole of the Act is of a strictly technical character from beginning to end. As far as I can see, technical words are used in their proper technical senses. The nature of the rights defined and the nature of the remedies given are all technical; and *primâ facie* it appears to me that the rule applies that technical words must have their technical meaning given to them unless you can find something in the context to overrule them. Now the words here are, "term of life or term of years"; and "reversion expectant upon the determination thereof" is the exact legal description of it. A reversion in law is not a remainder, the difference being that the reversion is what is left and the remainder is that which is created by the grant after the existing possession. I am not prepared to say that I can find anything in the nature of the case or in the context which would allow me to alter the meaning of the word "reversion." I say again, that is a subject which must be considered hereafter when the time arrives, but it must not be considered as concluded in any shape or in any way by the decision of this case in the Court below.

BRETT, L.J. :—

Two amendments were asked for in the Court below, one of which I think ought to have been granted, which is the material one in the present case, and the other I think ought not. I do not think the learned Judge exercised his discretion with regard to the facts of this case, but declined to allow both the amendments upon a particular view which he took of the meaning of the decision in *Newby v. Sharpe* (1). Now I think the decision in *Newby v. Sharpe* was a strong authority against the second amendment which was asked for, but was no authority against the first, which I think ought to have been allowed. I therefore venture to disagree with the learned Judge, not upon a mere question of discretion exercised with regard to the facts of this particular case, but on his declining to amend upon a particular

view of the case of *Newby v. Sharpe* (1). So much for the amendments. If the amendment had been allowed, the next question is this, had the Plaintiff such an interest in the particular portion of the foreshore which is now in question as to entitle him to maintain an action against the Defendant, assuming, for the purposes of the argument, that what the Defendant did was a wrongful act and could not be justified? It seems to me that the Plaintiff had no interest which entitled him to maintain such an action. Certain acts of the Plaintiff, which it is said could be proved, if necessary, are relied upon; but, as I understand, all those acts were acts done in the exercise of such rights as he had under the agreement. Then, if the agreement gives him no right to maintain the action, it seems to me that the acts that were asserted to be done under the agreement cannot give him any greater right. Now I think, upon the true construction of the agreement, it would give him no right in any way to maintain an action of trespass even against a wrongdoer. The words relied upon by Mr. *Cookson* were, that he would be entitled to all the "rights" of the landlord in this particular portion of the foreshore; but then, relying upon those words, he was obliged to admit, that, assuming his construction of them to be right, the remaining words of the first paragraph are entirely surplusage. We have no right to interpret an agreement according to any such construction. We are to give a meaning to all the words; and if we give a meaning to all the words of this agreement, it seems to me to shew that, with regard to this particular portion of the foreshore, he had only a right of entering upon it for the purpose of doing particular works, and he had no right to possession, and he did nothing which gave him an actual possession different from this agreement. He therefore was not in possession, and had no right of possession; he was not a person entitled to maintain trespass as against a wrongdoer; and he could not ask for an injunction. Therefore, upon the construction of this agreement, it seems to me the Plaintiff is not a person who can sue the Defendant at all. That being so, it obviously becomes wholly unnecessary to decide judicially the questions which have been raised with

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regard to the *Prescription Act*. I think it quite right to say that we must not be taken to agree with the decision of Mr. Justice *Fry* upon that Act. I think, so far as we are concerned, the points remain entirely open. They are questions of great importance, and when they do come to be considered they must be argued out fully on both sides. In my opinion, they are of such importance that, even after they have been argued out by both sides, I should be very loath to give an opinion upon them without taking time to consider my judgment.

COTTON, L.J.:—

Whatever may be the true construction of the 8th section of the *Prescription Act*, it cannot be disputed that, in order to entitle the Plaintiff to maintain this action, he must have some estate or interest in this foreshore. Now Mr. Justice *Fry* thought the Plaintiff had made out that he had “an estate or interest in the land” in consequence of the admission which he considered was made in the defence that he was in possession; and that from the evidence he was in possession in some way under the present Marquis: so that he considered he had an estate which represented the ultimate reversion. The right construction of the word “reversion” is another question. I agree that in this case the Defendant ought to be at liberty to amend for the purpose of withdrawing that admission, unintentionally made, on which Mr. Justice *Fry* relied. I by no means think it was necessary; because all that the Plaintiff alleged in the amended statement of claim was that he was in possession “upon the terms of the said agreement,” and therefore his allegation is simply what he had proposed to prove if the amendments were allowed, and that he had done acts since the death of the late Marquis under and in pursuance of that agreement. Then the question is, whether the agreement did give him “any estate or interest in the land,” which is this *locus in quo*. I am of opinion that it did not. You find a marked distinction throughout this agreement between the portions of the foreshore that were to be built upon and the portions of the foreshore not to be built upon. It was conceded that no part of the foreshore in front of the Defen-

dant's baths had been marked out by the surveyor of the Marquis as building sites, and therefore one must consider and deal with the case as if the *locus in quo* was land which under the agreement was not to be treated as a building site. What one finds is this, that in the 11th, 12th, and 20th clauses reference is made to the estate and interest to be granted by lease of the building sites when the houses are built and to the interest which the Plaintiff—when I say the “Plaintiff” I mean *Sanderson*—was to have in the building sites before they were built upon. Before they were built upon and before the leases were granted the 20th clause gave him a strict tenancy at will, but simply in those parts of which leases were to be granted. Clauses 11 and 12 confine the portions of land as to which a lease was to be granted to those portions which were to be built upon. As regards the remainder of the foreshore, there is no contract to give any lease; there is no contract that *Sanderson* shall have an estate or interest at will in that portion of the land; and, as I read it—I am not going through the clauses—it is this, that on this foreshore he was, by such authority as the Marquis could give him, to embank, to make roads, and to reclaim the land, and in certain portions of that land, which, so far as it was not to be built upon, was land of which the Marquis was always to retain possession, he was to have an estate and interest and a lease for ninety-nine years when he was prepared to build houses thereupon. So that under this agreement there is nothing but a right, so far as the Marquis could give it to him, to embank this land and make roads. The land remained in the Marquis. As regards other portions, he was to build thereon, and then he was to have leases granted. As this is so, the Plaintiff's whole case fails, because he cannot be considered as having any “estate or interest in the land.” I only wish to say that though I decide the case upon that point, it must not be considered that I agree with the opinion expressed by Mr. Justice *Fry* as regards the 8th section of the *Prescription Act*. About the word “easement” I say nothing more; and on the other question, as to what the meaning of “reversion” is, it would not be right, without hearing the argument, to express an opinion. All I say is, that it will be well worthy of consideration, when the point comes to be judicially decided, whether the term

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“reversion”—having regard to the fact that the section applies only where land is held for terms of lives or terms of years exceeding three years—is not to be considered and dealt with in the strict sense of a reversion expectant upon the grant of the terms mentioned.

Solicitors for Appellant: *Remnant, Penley, & Grubbe.*

Solicitors for Respondent: *Harrisons.*

M. W.

In re GREAT BRITAIN MUTUAL LIFE ASSURANCE
SOCIETY.

V.-C. H.

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Nov. 12.

Petition for Winding up an Assurance Society—Order for Scheme for Reduction of Contracts of Society—Life Assurance Companies Act, 1870, s. 22—Special Referee to prepare Scheme—Rules of Court, 1875, Order xxxvi., r. 34—Special Case for Opinion of the Court—Date at which Scheme to take Effect—Claims which had matured.

The Court of Appeal having discharged an order made for the winding-up of this assurance society on a petition presented for that purpose, and directed that a scheme should be prepared for a reduction of the amounts of the contracts of the society:—

Held, that the date of the presentation of the petition was the one at which the calculation should be made for settling the scheme:

Held, also, that the claims of policy-holders and annuitants which had matured before the date of the presentation of the petition must be paid in full; that annuities payable after that date must be reduced; that participating and non-participating policy-holders current must be reduced *pari passu*; and that all payments in arrear in respect of premiums, including half-premiums left as a charge on the policies, must be paid in full.

Approved J. C. D. 31. ca.
SPECIAL CASE stated by Mr. J. Young, special referee appointed in the matters of the *Companies Acts*, 1862 and 1867, and the *Life Assurance Companies Acts*, 1870 and 1872, and of the above-mentioned life assurance society, by order dated the 27th of January, 1881, pursuant to Rules of Court, 1875, Order xxxvi., rule 34.

On the 28th of October, 1880, *Clara Popham*, the administratrix of the assignee of a participating policy which had become a claim against the society, presented a petition praying for a winding-up order, or, in the alternative, that the amount of the contracts of the society might be reduced upon such terms and subject to such conditions as the Court might think fit under the 22nd section of the *Life Assurance Companies Act*, 1870.

On the 30th of October, 1880, another petition for the like purpose was presented by *George and Henry Mordaunt*, who were holders of a current policy.

On the 19th of November, 1880, upon hearing both of the petitions, the Vice-Chancellor made no order on *C. Popham's*

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petition, but made an order on *G. and H. Mordaunt's* that the society be wound up.

On the 19th of January, 1881, the Court of Appeal, upon hearing an appeal by *C. Popham* from the above-mentioned order, and upon the application of certain of the policy-holders that the contracts of the society might be reduced in place of a winding-up order, made an order on both petitions directing that the order of the 19th of November should be discharged, and that it should be referred to the Vice-Chancellor to settle a scheme for the reduction of the contracts pursuant to the said 22nd section: *In re Great Britain Mutual Life Assurance Society* (1).

On the 13th of January, 1881, *John Wright* and *J. Kirkwood*, holders of two non-participating policies, the moneys assured by which had become due, commenced an action on behalf of themselves and all others holders of policies of the same class and in the same position, asking for a declaration that they were entitled to a preferential claim on the funds of the society, and on the 17th of January, 1881, notice of motion for an injunction to restrain the directors from parting with the funds in prejudice of such claims was served on the society. On the 20th of January, 1881, the motion came on to be heard, and an undertaking was given on behalf of the directors in the terms of the notice until the trial of the action, but in consequence of the proceedings taken under the order of the 19th of January, 1881, no further steps had been taken in the action.

On the 27th of January, 1881, the Vice-Chancellor made an order that it be referred to Mr. *Young* to inquire and report upon what terms and subject to what conditions the contracts of the society should be reduced in place of making a winding-up order, and to settle a scheme for reducing such contracts for the approval of the Court, and the referee was to be at liberty to exercise and do any power or thing given or authorized by Rules of Court, 1875, Order xxxvi., rule 34.

On the 19th of February, 1881, another order was made directing that the former order should be served upon all persons being policy-holders and annuitants, and upon the persons, representatives of deceased policy-holders, whose policies had become claims.

In accordance with the order meetings of the various classes of persons interested were held before the Chief Clerk, and persons, six in number, were appointed to represent the six classes of policy-holders, the representatives of the persons deceased, and the annuitants.

Before reporting to the Court upon what terms and subject to what conditions the contracts should be reduced, or settling a scheme for reducing them, it was necessary that certain questions should be determined, and therefore the referee had settled this special case for the opinion of the Court pursuant to Rules of Court, 1875, [Order xxxvi., and it had been served upon the persons representing the several classes.

The claim of *C. Popham* was in respect of a policy which became payable on the 10th of October, 1879.

The material questions were—

Whether the date of the presentation of *C. Popham's* petition, or some other and what date, was to be taken as the one upon which the rights of all, or some of the six classes above mentioned, were to be determined and from which the scheme to be settled was to take effect; whether the holders of participating or non-participating policies in cases where the lives assured dropped prior to the date of the presentation of *C. Popham's* petition, or other the dates at which the rights of such holders were to be determined were liable to have their claims reduced pursuant to the 22nd section; whether the holders of non-participating policies which were current should have their contracts reduced *pari passu* with participating policies, or in what manner such reduction should as between those classes be made; whether the arrears of premiums due to the society upon policies on which one half of the first five years' premiums remained as a charge must be paid in full; and whether the persons entitled to certain annuities were liable to reduction, and whether in respect of arrears of their annuities or future payments only.

W. W. Karlake, Q.C., and *Beddall*, for the class represented by *Mrs. Popham* :—

The first question is, a scheme having to be prepared for a reduction of the society's contracts, what are the contracts and

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from what date shall the scheme take effect—whether from the date of the presentation of Mrs. *Popham's* petition, or from a subsequent period? The case would, if there were a winding-up, be within the provisions of sect. 10 of the *Judicature Act*, 1875. It has nothing to do with the *Joint Stock Companies Arrangement Act*, 1870 (33 & 34 Vict. c. 104), as the Court of Appeal declined to make a winding-up order, but directed a scheme for a reduction of the contracts to be framed: *In re Great Britain Mutual Life Assurance Society* (1). The question now is, at what time the scheme shall take effect. Section 84 of the *Companies Act* of 1862 (25 & 26 Vict. c. 89) enacts that a winding-up of a company shall be deemed to commence at the time of the presentation of the petition for the winding-up, and it is submitted that that is the time which should be fixed by the Court in giving directions under sect. 22 of the *Life Assurance Companies Act*, 1870 (33 & 34 Vict. c. 61), for a reduction of the contracts. No other time can properly be fixed. That being so, those persons whose claims had matured before the time of presentation of the petition should not be reduced at all. Whether the claims which matured between that time and the date of the order of the Court for a scheme to be prepared, viz., the 19th of January, 1881, would be in the same position, is a question to be considered: but in the case of *In re South Kensington Co-operative Stores* (2), it was held that a landlord was entitled to distrain for the full rent due after the date of presentation of the petition. It is submitted that the date of presentation should be fixed in this case.

Eddis, Q.C., and *Grosvenor Woods*, for annuitants:—

The question being whether the time of presentation of the petition or some other date should be that at which the contracts should be reduced and the rights of the parties determined, it is submitted that those persons who had become entitled to annuities at the date to be fixed, or before the presentation of the petition, should be paid in full, on the ground that their annuities had matured into actual debts at the date from which the scheme would take effect. From that date there would be a vested right to a sum of money, and it should be paid in full. As regards

(1) 16 Ch. D. 246.

(2) 17 Ch. D. 161.

annuities which were accruing, it would be very important to these annuitants to have the date fixed after the date of the order made for a scheme, or from the date when the scheme would be settled. In the case of a fire happening after the presentation of a petition for winding up, the holder of a policy in a fire insurance company would be entitled to prove for the full amount of his claim—not merely to the time of presentation of the petition, but to the time fixed for sending in proofs: *Macfarlane's Claim* (1). This society is insolvent, and the rules in bankruptcy must be applied to it. The contingent claims should be valued as liabilities: *Hill v. Bridges* (2).

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Hastings, Q.C., and *Dundas Gardiner*, for participating policy-holders whose policies were current, also submitted that the time of presentation of *C. Popham's* petition would be the correct one from which to prepare the scheme for the reduction contemplated.

W. Pearson, Q.C., and *Grosvenor Woods*, appeared for non-participating policy-holders whose claims had matured before the presentation of the petition of the 28th of October, 1880.

Kekewich, Q.C., and *Chubb*, were for non-participating policy-holders whose policies were current.

W. F. Robinson, Q.C., and *Kirby*, for the special referee.

C. B. McLaren, for the society.

Boome, for the Petitioners *G.* and *H. Mordaunt*.

H. B. Buckley, for policy-holders in the B list, and

Northmore Lawrence, for other parties.

W. W. Karlake, in reply, submitted that it would be quite impossible to prepare a scheme if the claims were to be kept open until a scheme should be finally settled.

HALL, V.C.:—

I am of opinion that I ought to treat the order which has been

(1) 17 Ch. D. 337.

(2) 17 Ch. D. 342.

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made for a scheme, and which supposes that a scheme can be prepared and carried into effect, as one which can be carried out. What there may be to shew that it cannot be done I have not before me. The Court of Appeal having required a scheme to be prepared for a reduction of the contracts instead of making a winding-up order, I think I am not going too far in saying that the order is one which must be considered as an order for the actual reduction of the contracts, and an order which shall date from the time which would have been fixed if there had been a winding-up order, and if the Court had not come to the conclusion that instead thereof a reduction should take place, and a scheme be prepared. Therefore, I hold that the date of the presentation of the first petition for winding up is that at which the calculations should be made for settling the scheme.

*W. W. Karlake, Q.C., and Beddall :—*

The second question is whether the claims on policies which had matured before the presentation of *C. Popham's* petition shall be paid in full or be reduced, and it is submitted that they should not be reduced, as the object of the 22nd section is to benefit policy-holders whose policies are current. It was for their benefit that reconstruction was set on foot. The claims of those who had become creditors should not be interfered with. The Court is only authorized to reduce current contracts, and has no power to reduce debts or damages.

[The case of *In re European Life Assurance Society* (1) was referred to.]

*W. Pearson, Q.C., and Grosvenor Woods*, for representatives of non-participating policy-holders who had died, took the same view, but submitted that their claims were better, they being in the position of mortgagees.

*Hastings, Q.C., and Dundas Gardiner, and Kekewich, Q.C., and Chubb*, for policy-holders current of both classes, submitted that the Court might reduce the amount of all the contracts of the company in accordance with the words of sect. 22. The claims

which had matured were contracts of the company, and should be reduced with those of the policy-holders current. If any of the parties had to sue the society for debt or for damages they must sue in contract. If their claims were not reduced they would obtain a substantial advantage which they would not get under a winding-up order.

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HALL, V.C. :—

Any policy which had matured into a debt is outside the scheme. There is much in the judgment of the Master of the Rolls in this case (1) which looks as if it were favourable to the view that the scheme would be something which would operate and be in active working order for the benefit of a body of continuing shareholders who have expressed a desire to keep the society on foot, and who proposed a reduction of the contracts as a means by which the society could be kept as a going concern. The Master of the Rolls said they would, "if the company is allowed to go on with a reduction of contracts, eventually receive the full amount of the reduced value of their policies, paying their premiums during their lives, which would be a very great benefit and advantage to them." This language is inapplicable to persons whose claims on their policies have matured, because they will not go on paying anything in order that they may ultimately receive payment of a reduced amount. They would have no chance of getting any reduced amount by reason of the continuance of the society. It seems to me that the policy-holders whose claims upon their policies have matured must be dealt with in the same way as any other persons who could enforce their claims against the society by action or otherwise, but for the proceedings which have taken place. As a necessary consequence, it follows that these existing liabilities must be cleared off just as much as if they were debts to persons who have supplied goods to the society. The outside debts must, of course, be paid, and in the same way, as I consider, the claims which have matured of any policy-holder must be discharged. The reduction of the contracts under a scheme may still be an advantage to the current policy-

(1) 16 Ch. D. 254, 255.

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holders who think it is desirable that the society should go on, even though some moneys must necessarily go to clear off the liabilities. As to the other questions submitted, I hold that the same principle will apply to any annuitant to whom any payment of an annuity became due before the presentation of the petition. Such an annuitant was in respect thereof a creditor prior to the 28th of October, 1880, and outside the scheme for reduction, but my decision does not apply to the payments which became due after that date. I also hold that the participating and non-participating policy-holders current must be reduced *pari passu*, and that where there are premiums in arrear they must be paid to the society in full as any other debts.

The costs of the special case must be paid out of the assets of the society.

Solicitors: *Longeroft & Myers*; *G. Blagden*; *Crumph & Son*; *Bellamy, Strong, & Co.*; *Dean, Chubb, & Co.*; *Miller & Vernon*; *W. Flux & Co.*; *Ashurst, Morris, & Co.*



## PAUL v. PAUL.

[1878 P. 105.]

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*Marriage Settlement of Wife's Property—Testamentary Power in Wife—Gift to Next of Kin of Wife in default of Appointment—Power of Revocation.*

By a marriage settlement the wife's property was settled, after life estates in husband and wife, and in default of children in the event of the wife surviving, on her, and in the event of the husband surviving, as the wife should by will appoint, and in default on her next of kin excluding the husband.

*Held*, that the trust in favour of the next of kin could not be revoked, and that the husband and wife together were not entitled to the *corpus* of the settled property.

*Paul v. Paul* (1) not followed.

*Approved on appeal 20th Dec 1881 ca*  
THIS was a petition by Mrs. *Barbara Paul*, with the consent of her husband *John Paul*, for the payment to herself and her husband of the *corpus* of the funds comprised in her marriage settlement, on the ground that in the event which had happened the only persons other than herself and her husband who had any interest therein were volunteers whose interest she was able to revoke.

By the marriage settlement of the Petitioner and her husband the said *John Paul*, dated the 2nd of November, 1845, the fortune of the Petitioner was settled upon the husband and wife successively for life with remainder to the children of the marriage.

There had been no children of the marriage, and the Petitioner was past the age of child-bearing.

In default of children of the marriage, the property was settled on the Petitioner absolutely if she survived her husband, but if she predeceased him she had a general power to appoint the property by will, and in default of appointment it was settled on her next of kin, excluding her husband.

On the 24th of March, 1864, the Petitioner and her husband executed a separation deed, which provided that during the husband's life half the income of the trust funds should be paid to the Petitioner for her separate use.

(1) 15 Ch. D. 580.

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This action was instituted by the Petitioner for the administration of the trusts of the settlement, and of the separation deed.

The Petitioner contended that, inasmuch as it was impossible that there could be children of the marriage, and the only persons who could become entitled in default of her appointment by will were her next of kin, an unascertained class, she was entitled to have the *corpus* paid out to her with her husband's consent; she petitioned accordingly that the capital of the trust funds in Court might be divided in certain proportions between herself and her husband, who consented to the petition.

On the 23rd of July, 1880, Vice-Chancellor *Malins* made an order on the motion of the Petitioner, with the consent of the husband, that a part of the capital of the trust funds should be applied in payment of debts incurred by the Petitioner. The case is reported (1), where the facts and the judgment of the Vice-Chancellor are fully stated.

*Glasse*, Q.C., and *Butcher*, for the Petitioner, relied on *Paul v. Paul* (1).

*Whitehorne*, Q.C., for the husband, supported the Petitioner's case.

*J. Pearson*, Q.C., and *W. Barber*, for the trustees of the settlement.

FRY, J.:—

I will read the judgment of the Vice-Chancellor.

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Nov. 7. FRY, J.:—

The Petitioners rely on the proposition that a settlor can revoke a trust which he has finally and conclusively declared in favour of a volunteer. This proposition is supported by the decision of my learned predecessor, Vice-Chancellor *Malins*, on a former petition in this suit, which is reported (1). But for that decision I should have thought that the law on this subject was clear. I thought that a gift conclusively made to or in favour of a volun-

(1) 15 Ch. D. 580.

teer was incapable of being revoked by the donor, and I thought that one mode of making such a gift was by a completed declaration of trust in favour of the volunteer. In my opinion the law has been conclusively settled in that way, and therefore, notwithstanding the respect which I entertain for my learned predecessor, and the anxiety which I always feel to follow his decisions, I am constrained to make no order upon the petition. But I shall give no costs. Inasmuch as two Judges entertain such diametrically opposite views of the law, I should be glad that the case should go to the Court of Appeal.

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Solicitors: *Meynell & Pemberton; Godden; S. Hare; Munns & Longden.*

C. W. C.

## ELTON v. CURTEIS.

[1873 E. 29.]

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*Mortgage—Foreclosure Decree—Computation of Interest subsequent to Certificate.*

When a judgment for foreclosure, obtained by a first mortgagee against subsequent mortgagees and the mortgagor, directs successive redemptions, and foreclosures in default of redemption, and a puisne mortgagee fails to pay the amount found due from him to the prior mortgagee for principal, interest, and costs, and is accordingly foreclosed, in taking the account against the person next entitled to redeem, subsequent interest ought to be computed on the whole sum found due from the person who has failed to redeem, *i.e.*, upon the interest found due from him, as well as upon the principal and costs.

## ADJOURNED SUMMONS.

This was a foreclosure action. The Plaintiff was the first mortgagee of the mortgaged property. The Defendants were *E. Curteis*, the mortgagor; *Evan Pugh*, the second mortgagee; and *C. P. Greenhill*, the third mortgagee. After the institution of the suit *George Pye*, the trustee in bankruptcy of the mortgagor, and *Sir Pryse Pryse*, were added as Defendants.

The Plaintiff's mortgage was dated the 3rd of September, 1872; *Pugh's* mortgage was dated the 4th of September, 1872; *Greenhill's* mortgage was dated the 30th of November, 1872.



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The Plaintiff was in possession of the property.

By the decree made on the hearing of the cause on the 11th of November, 1874, the ordinary accounts as against a mortgagee in possession were directed to be taken, and successive redemptions, and foreclosures in default of redemption were directed.

The Chief Clerk, by his certificate dated the 26th of July, 1875, certified that there would be due to the Plaintiff on the 26th of January, 1876, upon the balance of the accounts by the decree directed to be taken, the sum of £9412 17s. 5d., which sum the Defendant *Pugh* was thereby directed to pay to the Plaintiff on the 26th of January, 1876. On the 20th of May, 1875, *Pugh* had agreed to assign his interest in the equity of redemption to Sir *Pryse Pryse*, and in consequence of this *Pryse* was, by an order dated the 20th of January, 1876, added as a Defendant to the action. By an indenture dated the 31st of December, 1877, *Pugh's* mortgage debt and his mortgage security were transferred to Sir *Pryse Pryse*. On the 26th of January, 1876, Sir *Pryse Pryse* paid the Plaintiff the sum of £9412 17s. 5d., and by an indenture dated the same day the Plaintiff's mortgage security was vested in Sir *Pryse Pryse*. By another certificate, dated the 26th of July, 1880, the Chief Clerk found that subsequent interest on the sum of £9412 17s. 5d., which had been paid by Sir *Pryse Pryse* to the Plaintiff, from the 26th of January, 1876, to the 26th of July, 1880, amounted to £2083 7s. 3d., making, together with the sum paid to the Plaintiff, a total of £11,496 4s. 8d. He also found that there was due to Sir *Pryse Pryse* on *Pugh's* mortgage the sum of £5000 for principal, and for interest down to the 26th of July, 1880, the sum of £1945 4s. 9d., making together £6945 4s. 9d., to which was to be added £189 3s. 7d. for his taxed costs, making altogether £7134 8s. 4d. There was a balance of £1502 3s. 11d. due from him in respect of rents of the mortgaged property which he had received, leaving £5632 4s. 5d. due to him in respect of *Pugh's* mortgage, and a total sum of £17,128 9s. 1d. due to him on the two mortgages. The Chief Clerk also found that there would be due to Sir *Pryse Pryse* on the 26th of October, 1880, for three months interest on the sums of £9412 17s. 5d. and £5000, the further sum of £175 12s., making, with the £17,128 9s. 1d., a total of £17,304 2s. 1d., which the Defen-



dant *Greenhill* was to pay to Sir *Pryse Pryse* on the 26th of October, 1880. *Greenhill* made default in paying this amount, and on the 5th of February, 1881, the decree for foreclosure was made absolute against him.

By another certificate, dated the 25th of July, 1881, the Chief Clerk found that the subsequent interest on the sum of £17,304 2s. 1d., from the 26th of October, 1880, to the 25th of July, 1881, amounted to £629 14s. 9d., and that this, together with the sum of £94 9s. 6d., the taxed costs of Sir *Pryse Pryse*, made, with the £17,304 2s. 1d., a total amount of £18,028 6s. 4d. due to him. But from this was to be deducted a sum of £382 16s. 8d. due from him on account of rents of the mortgaged property which he had received, leaving a balance of £17,645 9s. 8d. due to him. The Chief Clerk also found that there would be due to Sir *Pryse Pryse* on the 25th of October, 1881, for three months' interest on the £17,304 2s. 1d., the further sum of £213 10s. 9d., making, with the £17,645 9s. 8d., a total sum of £17,859 0s. 5d., which was to be paid to him by the Defendants *Curteis* and *Pye* on the 25th of October, 1881.

The Defendant *Pye* took out a summons to vary this certificate (*inter alia*) by allowing out of the sum of £843 5s. 6d., the total amount certified to be due for subsequent interest on the sum of £17,304 2s. 1d., from the 26th of October, 1880, to the 25th of October, 1881, so much only as represented interest on that part of the £17,304 2s. 1d. which consisted of principal or at most of principal and costs, *i.e.*, in effect to disallow interest upon the interest which had accrued due since the date of the first certificate.

*Herbert Lake*, for the summons:—

Subsequent interest since the foreclosure of the third mortgagee should have been computed upon so much only of the £17,304 2s. 1d. as consisted of principal or at most of principal and costs, not, as the Chief Clerk has computed it, on the whole sum, including that part of it which consisted of interest. I do not dispute that subsequent interest was rightly computed upon the whole sum, principal, interest, and costs, paid to the first mortgagee, because that whole sum was actually paid by the second mortgagee

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to the first. But no payment has been made by the third mortgagee ; he was foreclosed for default in payment ; and in such a case the practice is not to compute subsequent interest against the mortgagor on so much of the sum which the third mortgagee ought to have paid as consists of interest. The original judgment was in the form given in *Seton* on Decrees (1), which directs the computation of subsequent interest, but does not say on what. It is not now the practice of the Court to compute interest on interest, which would be to give compound interest, except when a subsequent mortgagee pays off a prior one. The practice was formerly different : *Daniell's* Chancery Practice (2) ; *Whatton v. Cradock* (3) ; *Whitfield v. Roberts* (4).

[FRY, J., referred to *Harris v. Harris* (5), where a decree for sale of a mortgaged estate was made at the instance of the mortgagee and some bond creditors, and the mortgagee asked, on the computation of subsequent interest, for interest on the whole sum found due to him by the Master, including interest, and Lord *Hardwicke* said, "This case differs from the common one of a foreclosure, and it would be rather too much to give such an advantage to the mortgagee over the rest of the creditors, especially as the mortgage carries 5 per cent." And it is added : "His Lordship therefore proposed to his counsel, that, from the time of the Master's report being confirmed, it should carry only 4 per cent., and the plaintiff acquiescing in this proposal, his Lordship gave directions accordingly."]

*Wilkinson v. Charlesworth* (6) ; *Earl of Mansfield v. Ogle* (7) ; *Coote on Mortgages* (8). There is no precise authority on the point.

[*Cookson*, Q.C., for *Pryse*, referred to *Bickham v. Cross* (9).]

What Lord *Hardwicke* there said refers to the enlargement of the time for redemption, as to which the practice has clearly been altered. Formerly, interest had to be paid on the whole sum found due as a condition of the enlargement.

(1) 4th Ed. p. 1150.

(2) 5th Ed. p. 1107.

(3) 1 Keen, 267.

(4) 7 Jur. (N.S.) 1268.

(5) 3 Atk. 722.

(6) 2 Beav. 470.

(7) 4 De G. & J. 38.

(8) 4th Ed. p. 1111.

(9) 2 Ves. Sen. 471.

[FRY, J., referred to the report of *Bickham v. Cross* (1) as shewing that in that case Lord *Hardwicke* ultimately directed a computation of interest on interest.]

That order was made in an administration action, and *Whatton v. Cradock* (2) shews that the practice in such an action had then become different.

*Cookson*, Q.C., and *Yate Lee*, for *Pryse* :—

The reason for the alteration of the practice in the case of an enlargement of the time for redemption is this, that the Court now always requires an immediate payment of the interest and costs as a condition of the enlargement, and of course the person redeeming would not be required afterwards to pay interest upon the interest which he had already paid. That is the only reason for the alteration of the practice, and it extends no further in the case of a foreclosure decree.

[They were stopped by the Court.]

FRY, J. :—

The question I have to determine is shortly this: When there are successive mortgages, and a decree is made for the foreclosure of the subsequent mortgagees and the mortgagor, which in the usual manner directs the computation of subsequent interest upon the amount found due to the prior incumbrancer, is that subsequent interest to be calculated on the total amount certified as due, or only on so much of it as consists of principal or of principal and costs? It appears to me plain that the practice has been and still is to compute subsequent interest upon the entire amount, and that for the reason given by Lord *Hardwicke* in *Bickham v. Cross* (3). He there said that “where mortgagor came to redeem and mortgagee to foreclose, and afterwards there is a report computing what is due for principal, interest, and costs, all that is considered as one accumulated consolidated sum.” Then he afterwards said, “the Court only directs subsequent interest to be carried on, and leaves it to the Master, except as to mortgagees, in which the

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(1) 4 Bro. C. C. 319, n.

(2) 1 Keen, 267.

(3) 2 Ves. Sen. 471.

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compound sum always carries interest." The distinction between the mode of computing subsequent interest in foreclosure actions and other actions was recognised by Lord *Hardwicke* also in *Harris v. Harris* (1), and again by Lord *Langdale* in *Whatton v. Cradock* (2), and it appears to have prevailed throughout the whole course of the Court. That conclusion is in accordance with my impression of the ordinary practice, and it is not suggested that in this case there has been any departure from the ordinary practice of computation in Chambers. I think, therefore, that the practice is well established, and that this application is an attempt to alter the well-established and old practice of the Court. I therefore direct that the applicant do pay the costs of the summons.

*Lake* asked for an enlargement of the time for redeeming.

FRY, J.:—You must make a substantive application for that purpose, if you are entitled to it.

Solicitor for Defendant *Pye*: *J. L. Morris*, agent for *Middleton & Marshall, Colchester*.

Solicitors for Defendant *Pryse*: *A. F. & R. W. Tweedie*.

(1) 3 Atk. 722.

(2) 1 Keen, 267.

W. L. C.



COX *v.* JAMES.

CHITTY, J.

[1881 C. 3640.]

1881  
Nov. 4.*Practice—Adding Plaintiff—Consent—Rules of Court, 1875, Order XVI., r. 13.*

The consent which Order XVI., rule 13 (Rules of Court, 1875), requires to be given by a person whom it is proposed to add as Plaintiff need not be in writing; it is sufficient if the solicitor for the existing Plaintiff states that he consents on behalf of the proposed new Plaintiff, the solicitor taking the ordinary responsibility of using a Plaintiff's name.

IN this case the Plaintiff had applied by summons in Chambers for leave to amend his writ by adding a new Plaintiff, under Rules of Court, 1875, Order XVI., rule 13; but the Chief Clerk raised the objection that the proposed new Plaintiff had not signified in writing his consent to act, although the solicitor of the existing Plaintiff had stated that he was authorized to consent on behalf of the new Plaintiff. At the Chief Clerk's suggestion the Plaintiff now applied to his Lordship for directions.

*Cozens-Hardy*, for the Plaintiff:—

I am instructed that it has been the general practice in Chambers, upon such applications as this, to require the consent of the proposed new Plaintiff to be given in writing, by analogy to the practice in the case of a next friend consenting to act: but I submit that, inasmuch as rule 13 of Order XVI. does not in terms require that the "consent" should be in writing, it is sufficient if the solicitor of the existing Plaintiff says he consents on behalf of the new Plaintiff taking the responsibility of so doing, as he no doubt must do: *Nurse v. Durnford* (1). It is the constant practice in Court to amend a writ by adding parties without their written consent on counsel stating that he appears on their behalf.

CHITTY, J.:—

The Chief Clerk has already mentioned this matter to me, and

(1) 13 Ch. D. 764.

CHITTY, J. in order that some definite rule of practice should be laid down I have consulted the Master of the Rolls upon it. He agrees with me that, as the rule says nothing about the consent being in writing, it is sufficient if the solicitor of the original Plaintiff states that he consents on behalf of the proposed new Plaintiff. In doing so he takes the ordinary responsibility that attaches to a solicitor who uses a Plaintiff's name. I will therefore give leave to amend the writ as asked, without the written consent of the proposed new Plaintiff, the solicitor of the existing Plaintiff stating that he is authorized to consent on behalf of the new Plaintiff.

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Solicitor: *Worthington Evans.*

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[1880 J. 0423.]

*Practice—Action—Reference to Arbitration—Enforcing Award—Rule of Court.*

Where an action has been referred to an arbitrator by the Chancery Division it is not necessary to make the award a rule of Court before an order can be made founded on the award.

THIS was an action to restrain the Defendant from injuring or obstructing the Plaintiff's ancient lights, and the Plaintiff claimed damages and costs.

All matters in difference between the parties were referred to an arbitrator by an order of the 24th of February, 1881, who, on the 16th of August, 1881, made his award, whereby he assessed the damages suffered by the Plaintiff at the sum of £100.

This was a motion on behalf of the Plaintiff that the Defendant might pay to the Plaintiff the sum awarded by the arbitrator, and that the costs might be taxed and paid by the Defendant.

*Nalder*, in support of the motion :—

The award has not been made a rule of Court, but I submit that according to the present practice it is not necessary that the award should be made a rule of Court before obtaining an order

to enforce the award. The point came before the Master of the Rolls in a case of *In re Forrest* (1), and he made the order asked for without requiring the award to be made a rule of Court.

[He also referred to *Jones v. Jones* (2).]

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CHITTY, J.:—

On the authority of the case of *In re Forrest* you may take the order according to your notice of motion without making the award a rule of Court.

Solicitors: *Collyer-Bristow, Withers, & Russell*, agents for *Levett & Champney, Hull*.

(1) M. R. 1881. July 22.

*In re Forrest*.

BURROWES v. FORREST.

[1881 F. 345.]

FORREST v. BURROWES.

[1881 F. 364.]

TWO persons named *Burrowes* and *Forrest* had been in partnership until the latter died. Disputes then arose between the surviving partner and the administratrix of the deceased partner, with the result that *Burrowes* brought an action, claiming as creditor, for the administration of his deceased partner's estate, and the administratrix brought a partnership action against *Burrowes*, alleging that he was indebted to his intestate on the balance of the partnership accounts.

By an order, made on the motion of *Burrowes*, all matters in difference between the parties were referred to an arbitrator, who subsequently made his

award, directing that the administratrix should pay *Burrowes* a sum of money and his costs of the action.

*H. C. Deane*, now moved, on behalf of *Burrowes*, for an order enforcing the award. He mentioned that the award had not been made a rule of Court, but submitted that, according to the present practice, such a step was unnecessary. He referred to *Russell* on Arbitration (page 560) and to *Jones v. Jones* (14 Ch. D. 593).

JESSEL, M.R., expressed his opinion that it was desirable to assimilate the practice of the Chancery Division to that of the Common Law Division in such matters, and made the order asked for without requiring the award to be made a rule of Court.

Solicitors: *Morley & Shirreff*.

(2) 14 Ch. D. 593.

G. M.

CHITTY, J.

## MERCIER v. PEPPERELL.

1881

[1881 M. 1433.]

Dec. 2.

*Practice—Award—Motion to set aside—Objections to be specified—Common Law Procedure Act, 1852—Reg. Gen. Hil. Term, 1853, r. 169.*

A notice of motion in the Chancery Division to set aside the award of an arbitrator should specify the grounds of objection, by analogy to the practice under the *Common Law Procedure Act, 1852* : Reg. Gen. Hil. Term, 1853, r. 169 : an objection on “good grounds” being insufficient.

THIS action having been referred to arbitration, the arbitrator by his award, dated the 21st of October, 1881, directed, amongst other things, that the Defendant, *Pepperell*, should pay a sum of £153 8s. 11d. into the *London and County Banking Company*, to the joint account of himself and the Plaintiffs, and should also pay the Plaintiffs their costs of the action and a moiety of the costs of the reference.

The action now came on upon a motion by the Plaintiffs that the award should be made an order of Court ; also upon a cross-motion by the Defendant that the award “might be discharged on the ground of misconception or oversight of the said arbitrator as to the facts deposed to and the evidence adduced before him both verbal and documentary, *and on various other good grounds.*”

*Woodhouse*, for the Plaintiffs, submitted that he was entitled to have the award made an order of Court, and that the Defendant’s motion was irregular in that the notice of motion did not state the specific grounds of objection to the award, as it ought to have done, by analogy to the practice under the *Common Law Procedure Act, 1852*, on a rule to shew cause to set aside an award : *Russell on Arbitrations* (1).

*W. W. Cooper*, for the Defendant, admitted that the first part of his notice of motion was irregular, but submitted that the latter part stated above in italics was perfectly regular, and that he was,



therefore, entitled to shew, from the terms of the award itself, that a miscarriage had occurred, and that it had not in fact finally decided all the questions between the parties.

[CHITTY, J. :—Can you give me any authority shewing that the Common Law practice referred to ought not to prevail in the Chancery Division ?]

No : but I submit that it is sufficient if the notice of motion states that there are “good grounds” of objection to the award.

CHITTY, J. :—

I cannot hear you, Mr. *Cooper*, upon the award. Upon the objection raised by Mr. *Woodhouse*, it appears to me, although the case has not been very fully argued and I have not received much assistance from counsel for the Defendant, that the rule of practice in the Chancery Division in a case of this kind should be the same as that mentioned in Mr. *Russell's* work on Arbitration as being the rule under the *Common Law Procedure Act*, 1852. Referring (1) to rule 169 of the General Rules of Hilary Term, 1853, he says that where a rule to shew cause is obtained to set aside an award the grounds for so doing should be stated in the rule ; and several authorities are referred to in support of that proposition which shew that the Court requires a considerable degree of particularity in the statement of the grounds of objection.

In the present case the Defendant, *Pepperell*, is moving to set aside the award on notice, and he has stated on the face of his notice of motion several grounds, but when his counsel comes to argue the case, he says that none of the grounds stated are those on which he intends to proceed, but that he is entitled to proceed on “good grounds” generally. I do not know what could be more productive of inconvenience than such a practice as that. The notice of motion is in these terms :—[His Lordship read it, and continued :—]

Now, the real ground on which I am asked to set aside the award is want of finality ; but that ground is not stated in the notice of motion. In my opinion I shall do right to follow the Common Law practice by adapting it to the ordinary mode of

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(1) 5th Ed. p. 681.

CHITTY, J. procedure in the Chancery Division; that is to say, I hold that the  
1881 grounds of objection should be specified, not in a rule *nisi*, but in  
MERCIER a notice of motion served on the opposite party. Applying then  
v. that practice to the present case, I decide that the motion is mis-  
PEPPERELL. leading, and therefore I dismiss it with costs.  
—

With regard to the Plaintiffs' motion, I make the award an order of Court, as asked.

Solicitors: *V. H. Labrow ; C. R. S. Hoope, Richmond.*

G. I. F. C.

*In re* HOPKINS.  
DOWD v. HAWTIN.

[1880 H. 3627.]

C. A.

1881

Nov. 2.

*Practice—Conduct of Proceedings—Administration Actions—Receiver—Bankrupt Administrator.*

An action was commenced in the Court of one of the Vice-Chancellors for the administration of the estate of a testator, against the administrator with the will annexed. The administrator, being interested in that capacity in the estate of another testator, commenced an action for the administration of his estate in the Court of a different Vice-Chancellor, and then became bankrupt. The Plaintiff in the first suit moved in that suit that a receiver of the estate might be appointed, and that the Plaintiff might be permitted to prosecute the second action in the name of the administrator:—

*Held*, that the Plaintiff was entitled to the order asked for, and that it was properly made in the Court to which the first action was attached.

In such a case it is not the modern practice to permit the receiver to carry on an action in the name of a bankrupt executor or administrator.

THIS action was commenced in 1880, in the Court of Vice-Chancellor *Bacon*, to administer the estate of *Daniel M. Hopkins*, the Plaintiffs being Mr. and Mrs. *Dowd*, in right of Mrs. *Dowd* claiming as one of the next of kin of the deceased, and the Defendant *P. P. Hawtin*, being the administrator of the deceased with his will annexed. An order for the administration of the estate was made on the 27th of November, 1880.

The Defendant *Hawtin*, in his capacity of administrator of *Hopkins*, was interested in the estate of *T. Eldridge*, and in January, 1881, he brought an action in Vice-Chancellor *Hall's* Court for the administration of that estate (*In re Eldridge, Hawtin v. Wyatt*). An order for administration was obtained in that action on the 5th of February, 1881.

In May, 1881, *Hawtin* and his partner, Mr. *Pain*, who were solicitors, filed a liquidation petition, and the Plaintiffs in *Dowd v. Hawtin* thereupon took out a summons in that action before Vice-Chancellor *Bacon*, asking that a receiver might be appointed of the estate of *Hopkins*, and that the Plaintiffs might be at liberty to continue the action of *Hawtin v. Wyatt* in the name of *Hawtin*.

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The summons was adjourned into Court, and on the 14th of June, 1881, Vice-Chancellor *Bacon* made an order appointing a receiver of the estate, but refusing to permit the Plaintiffs to continue the action of *Hawtin v. Wyatt* in the name of *Hawtin*.

The Plaintiffs appealed from the order so far as it refused their application.

*Higgins*, Q.C., and *Terrell*, for the Appellants, referred to *Harrison v. Richards* (1); *In re Johnson* (2).

They were stopped by the Court.

*Whitehorne*, Q.C., and *Northmore Lawrence*, for *Hawtin*:—

The application ought to have been made in the Court of Vice-Chancellor *Hall* in the action of *Hawtin v. Wyatt*, not in the action in Vice-Chancellor *Bacon's* Court.

[JESSEL, M.R.:—It was quite regular to make the application in Vice-Chancellor *Bacon's* Court.]

It is not the practice of the Court in a case like the present, where an executor is deprived of the conduct of the suit, to substitute the Plaintiff in the administration action for him; the proper course is to give the conduct of the action to the receiver.

[JESSEL, M.R.:—The practice is different now to what it was in former times. The conduct of an action is now never given to a receiver.]

It is a matter in the discretion of the Judge. The estate is sufficiently protected by the appointment of the receiver.

JESSEL, M.R.:—

This is an appeal from an order of Vice-Chancellor *Bacon* dismissing the second part of an application which was simply a corollary to the first part of the application which he granted. The first action was an ordinary suit for administration of the estate of *Hopkins* against *Hawtin*, his legal personal representative, who as such was entitled to a share in another estate. It became necessary for *Hawtin* to institute a suit to administer the other estate, and he accordingly commenced an action in Vice-Chancellor *Hall's* Court for that purpose, in which a decree

(1) Law Rep. 1 Ch. 473.

(2) Law Rep. 1 Ch. 325.



was made. *Hawtin* then became bankrupt, and the Plaintiffs in the first action made an application in Vice-Chancellor *Bacon's* Court for the appointment of a receiver of *Hopkins' estate*, and for liberty to prosecute the action in Vice-Chancellor *Hall's* Court in *Hawtin's* name. It makes no difference whether *Hawtin's* conduct had been fraudulent or not: it is not fit that a man who is a bankrupt should continue to be a trustee without the consent of the *cestuis que trust*. Therefore the first part of the application was a matter of course. A receiver was rightly appointed, and the Plaintiffs ought to have been permitted to conduct *Hawtin's* action, and the bankrupt ought to have made no opposition. Why did he oppose the application? It is impossible to be sure of men's motives, but interest generally is the principal one. In the present case no one had an interest in opposing the application except *Hawtin's* solicitor. *Hawtin* certainly had none himself. I am of opinion that the application ought not to have been refused by the Vice-Chancellor, and the Respondent must pay the costs of the appeal.

BAGGALLAY, L.J. :—

I am of the same opinion. It is not necessary to repeat the facts which have been stated by the Master of the Rolls. I agree with him that on the second part of the application the Vice-Chancellor's order was erroneous and must be rectified, and that the Respondent must pay the costs.

BRETT, L.J. :—

I am also of the same opinion. As to the first point, I think that the application was properly made in the Court of Vice-Chancellor *Bacon*. In the second place, I am of opinion that the whole order asked for ought to have been made; and further, that if the first part of the order was made it followed as a necessary consequence that the second part should be made also. I cannot understand how one part of the order could be made without the other.

LUSH, L.J. :—

We have only to look at the actual position of affairs to see

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C. A. that this appeal must succeed. *Hawtin* was Plaintiff in one  
 1881 action and Defendant in the other. He became bankrupt. There  
 ~~~~~  
In re can be no question, but he could not be allowed to carry on the
 HOPKINS. suit in which he was Plaintiff. Who then is to do it? It must
 DOWD be either the Plaintiffs in the other action or else the receiver.
 v.
 HAWTIN. That is merely a question of practice, and it appears that it is
 ~~~~~ not the practice for the receiver to have the conduct of a suit,  
 therefore the Plaintiffs are the proper persons. The appeal must  
 be allowed with costs.

Solicitors: *H. W. Chatterton; R. M. & F. Lowe.*

M. W.

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 FRY, J.  
 July 8.

*In re* COLTMAN.  
 COLTMAN v. COLTMAN.

[1881 C. 154.]

C. A.  
 Nov. 5.

*Friendly Society*—38 & 39 Vict. c. 60—*Powers of Investment*—*Illegal Loan*.

23 CD 449  
 11 QBD 567

The trustees of a friendly society lent out of the surplus funds of the society a sum of £300 to *A.* on the security of a joint and several promissory note made by *A.*, and by *B.* and *C.* as his sureties. None of the makers was a member of the society. *C.* having died, the trustees claimed to prove against his estate on the note:—

*Held*, by *Fry, J.*, that the loan on personal security to a person not a member of the society was forbidden by the *Friendly Societies Act*, that the transaction therefore was illegal, and that as *C.* had not received any money of the society, and the society had no claim against his estate except under the contract, the proof must be rejected.

*Held*, on appeal, that as it was not alleged that the money was borrowed for an illegal purpose, the contract was not illegal, but merely unauthorized; that it was not competent to the makers of the note to allege by way of defence that the payees had no authority to lend the money, and that the proof, therefore, must be admitted.

ON the 4th of September, 1877, *Joseph Marshall, John Marshall*, and *E. C. Coltman* signed and gave the following promissory note:—

“On demand we jointly and severally promise to pay *Joseph Robinson, Charles Hands*, and *Mark Ghent*, of &c., the sum of £300, together with interest after the rate of £4 per cent. per annum.”

This note was given to secure £300 advanced to *Joseph Marshall*, the other two makers being only sureties. *Robinson, Hands*, and *Ghent* were the trustees of the *Victoria Friendly Society* at *Burbage*, a society registered under the *Friendly Societies Act*, 1875, and the £300 was advanced by them out of the surplus funds of the society. Neither *Joseph Marshall* nor either of the sureties was a member of the society.

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*Coltman* died intestate in December, 1879, and his estate was being administered by the Court. *Robinson, Hands*, and *Ghent* claimed to prove for the £300 with an arrear of interest. The Chief Clerk having allowed the claim, the personal representative took out a summons to vary the certificate, which came on to be heard on the 8th of July, 1881.

July 8. *Glasse, Q.C.*, and *Dunning*, in support of the summons:—

We submit that the trustees of these friendly societies had no power to lend money, as they did in this case, upon the personal security of persons not being members of the society: *Ashbury Railway Carriage and Iron Company v. Riche* (1); *Humphreys v. Welling* (2).

*North, Q.C.*, and *Woodroffe*, for the claim:—

This transaction is not forbidden by 38 & 39 Vict. c. 60, s. 16: *Sharp v. Taylor* (3). Where an act is not specified as illegal, you must look to the general purpose and scope of the statute: *Great Eastern Railway Company v. Turner* (4); *Brown v. Duncan* (5); *Corporation of Liverpool v. Wright* (6); *Stevens v. Gourley* (7). In 18 & 19 Vict. c. 63, s. 32, the same words are used. There is no reason of public policy for depriving the trustees of the right to recover.

FRY, J.:—

The facts in this case have not been in controversy before me, and they may be shortly stated in this manner. The trustees of

(1) Law Rep. 7 H. L. 653, 672.

(2) 1 H. & C. 7.

(3) 2 Ph. 801.

(4) Law Rep. 8 Ch. 149.

(5) 10 B. & C. 93.

(6) Joh. 359.

(7) 8 C. B. (N.S.) 99.

*5 Jan 25 1187*  
*6 Jan 25 148*

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a friendly society, known as the *Victoria Friendly Society*, lent the sum of £300 on a promissory note which was dated the 4th of September, 1877. It was given by three persons, one of whom was *Marshall*, the borrower, and by two sureties, of whom one was the intestate in the present action. Neither *Marshall* nor either of the sureties was a member of the friendly society. It is not in dispute that such a lending was beyond the powers of the trustees of the society, but nevertheless they are seeking to recover against the intestate's estate upon the promissory note so given by him.

The question which has been argued before me is this: was that loan an act merely beyond the powers of the trustees, or was it one which is unlawful and prohibited by statute?

In order to answer that inquiry, it of course becomes necessary to refer to the statute in force with regard to friendly societies. That statute is 38 & 39 Vict. c. 60. Sect. 16 provides that, "The trustees, with the consent of the committee of management or a majority of the members of a society present and entitled to vote in general meeting, may from time to time invest the funds of such society, or any part thereof, to any amount in any of the following ways." Then five methods are enumerated, the first four of which have nothing to do with a loan of this description. The last is "upon any other security expressly directed by the rules of the society, not being personal security, except as hereinafter authorized with respect to loans." Then sect. 18 provides with respect to loans to members in registered societies, that the society may lend in a particular manner to particular members. In terms, therefore, the loan in question is prohibited by the statute, and it is very difficult, in my opinion, to draw any distinction between cases of express prohibition, by reference to the motive with which the prohibition may have been imposed by Parliament. In the next place, it appears to me that if I regard the object of the society, that object is inconsistent with loans to persons other than members. The first statute which was passed with regard to friendly societies contains a recital of the objects of such societies which I believe to be substantially correct in the present day, and to have been correct throughout the whole period which has elapsed from the passing of the statute in 1793



(43 Geo. 3, c. 54) to the present time. It recites: "Whereas the protection and encouragement of friendly societies in this kingdom for raising by voluntary subscriptions of the members thereof separate funds for the mutual relief and maintenance of the said members in sickness, old age, and infirmity, is likely to be attended with very beneficial effects, by promoting the happiness of individuals and at the same time diminishing the public burthens." It is obvious that if some of the moneys to be raised by the subscription of the members are to be lent to persons other than members, the relief and assistance will not be of the mutual description which is the main object of these friendly societies, and those societies may easily and almost naturally be converted into institutions for a perfectly different object, and become, in fact, loan societies.

Furthermore, I observe that the subject of the investment of the moneys of these societies has been an anxious subject of legislation from the very first Act passed with regard to friendly societies down to the Act which is now in force. The statute which I have last referred to, and no less than nine of the subsequent Acts of Parliament which have been passed for the regulation of these societies, contain provisions with regard to the mode of investment of their funds, a fact which is enough to shew that this subject of investment of the funds has been one of anxious concern to the Legislature of the country.

It appears to me, therefore, that I must come to the conclusion that the Legislature has for a fixed purpose and design confined the loans to be made by these societies to members of the societies, and that therefore a loan made to a person other than a member is a direct violation of the objects of these societies, and of the express statutory provision in force with regard to them.

I think, therefore, that the transaction was one which is illegal, and therefore one on which no action can be maintained.

One other observation only do I desire to make. In the case of *Hardy v. Metropolitan Land and Finance Company* (1) the Court of Appeal gave relief to a friendly society as against a person who had borrowed money from the society in violation of the restriction to which I have referred; but that case appears to

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me to be perfectly different in principle from the present. The money in that case was the money of the society, independent of the illegal transaction, and accordingly the Court of Appeal held that, it being trust money, and trust money in the hands of the Defendants, it could be recovered by the Plaintiff. Here, but for the illegal transaction, there was no relation whatever subsisting between the claimant and the intestate. The whole right against the intestate's estate arises out of the transaction which I hold to be illegal. There is no antecedent right to this property in the hands of the intestate, and, consequently, I hold that the claim cannot be substantiated. I therefore vary the Chief Clerk's certificate in the manner I have indicated.

C. W. C.

C. A. The trustees of the society appealed. The appeal came on to be heard on the 5th of November.

*Davey, Q.C., and Woodroffe, for the Appellants:—*

The Act 38 & 39 Vict. c. 60, s. 16, sub-s. 1, contains no prohibitory words: it is an enabling clause. The loan, no doubt, was unauthorized, but it was not illegal. A trustee who lends money on unauthorized securities is not precluded from recovering on them. The money was not lent for an illegal purpose as in *Pearce v. Brooks* (1), *McKinnell v. Robinson* (2), and *Cannan v. Bryce* (3).

*Glasse, Q.C., and Dunning, contra:—*

The statute prohibits a loan to strangers on personal security, and the contract was, therefore, illegal. It is not necessary that the act prohibited should be *malum in se*. The contract being illegal, the claimants cannot recover on it: *Ashbury Railway Carriage and Iron Company v. Riche* (4); *Stevens v. Gourley* (5).

JESSEL, M.R.:—

This is an appeal from the decision of Mr. Justice *Fry*, and I must say, with the greatest possible deference to the learned Judge, that I am unable to arrive at the conclusion at which he arrived.

(1) Law Rep. 1 Ex. 213.

(3) 3 B. & A. 179.

(2) 3 M. & W. 434, 441.

(4) Law Rep. 7 H. L. 653, 672.

(5) 7 C. B. (N.S.) 99.

*67m 25 / 48*

The claim is on a promissory note payable by three persons jointly and severally to three persons as individuals. There is no dispute that the consideration was paid and that the note is unpaid. One of the three makers has died, and, it being a joint and several note, a proof was asked to be admitted against his estate. That proof has been rejected on this ground, that the money advanced was money belonging to a friendly society—that the lenders were the trustees of that society—that the *Friendly Societies Act* (38 & 39 Vict. c. 60) makes a lending of money on a personal security to persons not members of the society an illegal act, and consequently that the trustees are not entitled to recover this money as against the estate of the maker who has died. Now it appears to me that there is nothing in the Act to make the contract illegal. The Act says that the trustees, with the consent of the committee of management or a majority of the members of the society, may lend the money of the society on certain securities, not including personal securities, but there is nothing in the Act which directly or indirectly prohibits the lending on personal security beyond the fact that it gives the trustees no authority to do so, and that their doing so would therefore be a breach of trust. I cannot find anything in the Act which would prevent all the members from effectually authorizing a loan on such security, though a mere majority could not do so. There is, therefore, nothing that I can find in the Act of Parliament which makes the loan illegal, and it seems to me that the ground for the decision fails.

I am not satisfied that an express provision in the Act of Parliament that the trustees should not lend money upon personal security would have made any difference. The loan would have been wrong, it would have been an appropriation of the society's money to their own use, but there would not have been any such illegality in the transaction as would preclude the trustees from recovering the money lent. It seems to me that to hold it to be incompetent to maintain an action under these circumstances would be to say that it was incompetent for a trustee who had improperly appropriated the money of the society and lent it in his own name to take steps to enable him to restore it. How the persons who borrowed it, there being no illegality in the borrowing

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on their part, and no illegality in their agreeing to repay the money so borrowed, and no illegality in the purpose to which they were intending to apply it, can set up the doctrine that they are relieved from their liability by reason of the money having originally belonged to a friendly society, is a thing which I am quite unable to understand.

It appears to me, therefore, that the decision appealed from cannot be sustained, and that the appeal must be allowed.

BRETT, L.J.:—

The learned Judge has held that this contract is an illegal contract, and has applied to it the ordinary rule of law that no person can sue in a Court of Law or Equity upon an illegal contract. It is said that the Act 38 & 39 Vict. c. 60, s. 16, prohibits such a contract, and thereby makes it illegal. It seems to me that this section is not a prohibitive but an enabling section. The Appellants are trustees of a friendly society. They have not, by virtue of their office, any authority at Common Law to lend the money of the society at all, and they required a statutory authority to enable them properly to do so. That authority is given to them in this 16th section, but only under certain circumstances and subject to certain rules. It seems to me that the section does not give them authority to lend to strangers on personal security, and such a loan could not be sanctioned except by the authority of all the members, the consent of a committee or of a majority of members not being sufficient. This section, therefore, shews that the money which was the consideration for the promissory note in this case was lent by the trustees without authority. But does it follow that because the money is lent by a person who has no authority to lend it, therefore that contract is an illegal contract? It seems to me that it does not follow.

The only objection to this loan is that it was made without authority. But it does not seem to me that the borrower can set up as a defence to an action that the person who lent him the money, and to whom he has made a promise to repay that money, had no authority to lend it to him. That is an objection which it is not for him to take. The contract is, If you will lend me so much money I will pay you that money back on demand. The



consideration is the handing over the money. That is not illegal. The promise to pay back money which you have borrowed is not illegal. The money was not borrowed for any illegal purpose, in order to do an illegal or immoral thing, and I cannot see that there is anything illegal in the contract. The only objection is, that those who made the contract with the debtor had no authority to make it, and that is an objection which he cannot take.

The cases referred to by the Respondent do not, in my opinion, support his contention. The case of *Ashbury Railway Carriage and Iron Company v. Riche* (1) only decides that if the directors of a company assume to make a contract on the part of a company which neither the directors nor the company have authority to make, that contract cannot be enforced against the company, and, moreover, that it is so void from the beginning that it cannot be ratified by the company so as to make them liable. But the House of Lords did not hold that if money had been lent by directors without authority, the money could not have been recovered, or that the borrowers could set up the defence that those who lent them the money had no authority to do so. In *Stevens v. Gourley* (2) the subject-matter of the contract was the building of a house. The contract was, "If you will build me a house of a particular construction I will pay you for it." But to build a house of that particular construction was an illegal act, therefore the consideration for the payment of the money was the doing an illegal act. The subject-matter of the contract there was illegal, and that case, therefore, has no bearing upon the present.

Under these circumstances I am unable to agree with the learned Judge whose judgment is appealed from. He proceeds on the ground that the contract was illegal, whereas, in my opinion, the only objection is that it was made by persons who had no authority to make it, and that is an objection which the makers of the note could not take.

LINDLEY, L.J. :—

I am of the same opinion. This is a claim on the part of three gentlemen to be admitted as creditors against the estate of a gentleman of the name of *Coltman*, who, together with two other

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(1) Law Rep. 7 H. L. 653.

(2) 7 C. B. (N.S.) 99. 6/2 1881

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persons of the name of *Marshall*, has signed a joint and several promissory note, by which the makers of the note promise jointly and severally to pay to the payees the sum of £300, with interest at 4 per cent. The objection taken is that there is some illegality in that promise to pay. The reason given for holding it illegal comes at most to this, that the payees got from an improper quarter the money which they lent. It cannot be put higher than that. It cannot be carried to the extent that there is anything illegal in the promissory note. There is nothing illegal in the promise and nothing illegal in anything except that the money was got from a place from which the payees had no right to take it. To say that this makes the contract to repay the money an illegal contract is quite new to me, and no authority has been cited to that effect. It appears to me, upon principle, that the mere fact that they got the money from a place from which they had no right to take it does not in any way invalidate the promise to repay it on demand. I am of opinion that the appeal must be allowed.

Solicitors for the Friendly Society: *Robinson, Preston, & Stow.*  
Solicitors for the Administrator: *Wright & Law.*

H. C. J.

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### WARNER v. MOSSES.

[1879 W. 243.]

*Taxation of Costs—Copies of Pleadings on Interlocutory Application—Rules of Supreme Court (Costs), August, 1875, r. 26.*

An order had been made by the Court of Appeal on the application of the Defendants directing part of an affidavit to be struck out as scandalous and giving the Defendants the costs of the application. Among the items in the bill of costs of the Defendants were charges for four copies of the pleadings, one for the use of counsel and three for the use of the Judges of the Court of Appeal. The Taxing Master, without entering into the consideration of the question whether the copies were necessary for the purpose of the application, disallowed them on the ground that it was the general rule not to allow the costs of copies of pleadings on an interlocutory application:—

*Held*, by the Court of Appeal, that no such general rule as was alleged to exist in the Taxing Master's office could be sustained; that it was the duty

of the Taxing Master, under the Rules of the Supreme Court (Costs), rule 26, to consider in each case whether the copies were "necessary or proper for the attainment of justice," and that as the copies in the present case were necessary for the hearing of the application, the costs of them must be allowed.

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THIS was an appeal from a decision of Vice Chancellor *Bacon*, in Chambers, disallowing objections to a Taxing Master's certificate.

The Defendants had applied to have part of an affidavit filed on behalf of the Plaintiff struck out as scandalous. Vice-Chancellor *Bacon*, on the 25th of March, 1881, ordered the motion to stand over till the trial of the action, and reserved the costs. On the 26th of April the Court of Appeal discharged this order, and ordered the 25th paragraph of the affidavit in question to be struck out, and ordered the Plaintiff to pay to the Defendants their costs of the order of the 25th of March, 1881, and occasioned by the appeal, to be taxed by the Taxing Master as between solicitor and client.

Among the items of the bill of costs carried in under this order were charges amounting to £8 1s. for four copies of the pleadings in the action, one for the use of counsel and three for the use of the Judges, also charges for briefs of the evidence filed in the cause. The Taxing Master disallowed all these charges. The Defendants took in objections.

Master *Skirrow* answered as follows:—

"The Defendants claim to be allowed on the hearing of an application a brief of the pleadings and all the evidence filed in the cause for counsel, and as the order was appealed from the Defendants also claim three copies of the same documents for the Appeal Court.

"I have disallowed such copies, as it is not usual in practice to allow in an interlocutory application copies of all the pleadings and evidence for counsel. Such copies are only allowed at the hearing of the cause.

"The same remark applies to the copies for the Appeal Court.

"Objections having been taken to my taxation, I have reviewed the same, and consider, under the circumstances of this case, that copies of the affidavit in question only should be allowed, and I

C. A. have altered my taxation accordingly. I overrule the rest of the objections.”

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The Defendants appealed to Vice-Chancellor *Bacon*, who, in Chambers, dismissed the application with costs.

The Defendants appealed from this decision so far as regarded the disallowance of the four copies of pleadings.

*S. Dickinson*, for the Appellants:—

I rely on the Rules of the 12th of August, 1875, Order vi., rule 2, and the schedule there referred to, which expressly provides for copies, and the costs of them ought to be allowed unless they were unnecessary. If the Taxing Master had exercised his discretion and held them to be unnecessary, I admit that we could not have appealed from his discretion on such a matter. He has not, however, exercised any discretion of that kind, but has acted on a supposed general rule, which I submit cannot be maintained. That copies of the pleadings in a case like this were necessary for the use of the Judges is clear.

*Grovesnor Woods*, *contra*:—

It would be a dangerous decision to hold that in every case the Taxing Master should exercise a discretion as to whether on an interlocutory application copies of the pleadings are necessary.

[JESSEL, M.R.:—Rule 26 of the same order appears to impose the duty upon him.]

The case is better left to be governed by a general rule, though I cannot deny that in the present case the copies were necessary. The copies will be ready for use hereafter, and the costs of them can be allowed at the hearing.

JESSEL, M.R.:—

This appeal, though it is for a very small sum, raises a question of principle which appears to me to be of some importance. The Appellants succeeded before the Appeal Court on a motion to strike out a portion of an affidavit for scandal. The case was one of considerable perplexity; the pleadings are long, and it required very minute examination of the pleadings and careful



comparison of them with the affidavit to decide whether or not the allegations that were objected to were fairly relevant to the issues in the action. The Court came to the conclusion that they were not, and ordered the Respondent to pay the costs of the motion. On going before the Taxing Master, it appeared that there were four copies of the pleadings sought to be charged for, one which had been furnished to the counsel for the Appellants, and three which had been furnished to the three Judges of the Court of Appeal. Those costs have been disallowed, on the ground that, as a general rule, in the taxing office the costs of pleadings are not allowed on an interlocutory application, and that without regard to the question whether they are or are not, according to the expression used in the 26th rule of the Costs Order, "necessary or proper for the attainment of justice."

Now in this case it is clear that the copies were necessary. The case could not have been argued by counsel without a copy of the pleadings, nor could it have been decided by the Judges without their having copies. Mr. *Grosvenor Woods*, with his usual fairness, has admitted this, and had he not admitted it, my own recollection would have enabled me to supply the deficiency. It being therefore absolutely necessary for the attainment of justice that the copies should be supplied, why should they not be allowed on taxation? The only suggestion made is that it would be inconvenient for the Taxing Masters to have to consider in each case whether the copies were wanted or not. I do not agree as to the inconvenience. Neither a Taxing Master nor a Judge can complain that he has to decide on what is necessary or proper for the attainment of justice. So far from the Taxing Masters having a right to complain of being called upon to decide such a question, the 26th rule imposes on them in every case the obligation of doing so, and I should be sorry were it otherwise. I am quite sure that those gentlemen would never think of complaining of being trusted with that discretion, or of having the trouble of exercising it. It appears to me that that is no sufficient reason, and that no such general rule as is stated to exist in the Taxing Master's office can be sustained. I think, therefore, that this appeal should be allowed, and of course the Appellant will get his costs.

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C. A. BRETT, L.J. :—

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If the question had been whether the Master in this particular case had come to a right or a wrong conclusion as to the necessity or propriety of supplying these copies, I should not have been able to listen with patience to the appeal. We have steadily set ourselves against appeals upon questions raised on taxation involving small amounts where the decision of the Master is first brought before a Judge to be reviewed, and then in some cases to a Divisional Court, and afterwards it is proposed to bring it before the Court of Appeal. But in this case the question is not one of that class, it is a question of principle. It is said that the Masters have adopted a general rule going to this length, that although in the particular case they may be persuaded that copies of the pleadings were necessary, still, as they were used only for the purpose of an interlocutory application, they will not allow the costs of them.

The question in this case is whether the costs of certain copies of pleadings should be allowed which were supplied upon an application with regard to an affidavit. One of the copies in question was supplied to counsel for the purpose of that motion, and the others to the Judges of the Court of Appeal. It is said that those pleadings may be used at the trial of the action and the costs of them allowed hereafter, but it is not certain that they will ever be wanted for that purpose, and still less that they will be wanted for the purpose of an appeal, and therefore if the costs of them are not allowed on this motion they probably can never be allowed at all. The Master has decided against the allowance of them, not with regard to his view of this particular case, but by reason of a general rule that such copies are not to be allowed on an interlocutory application, however necessary they may have been for the purpose of that application. That general rule seems to me to be wrong, and it is no answer to say that the Masters will be put to trouble if they have to inquire in every case whether the copies are necessary. The Masters exist for the purpose of being troubled with the duties of their office just as Judges exist for the like purpose. They must take the trouble. If in any particular case where the Taxing Master has inquired into the question it is said that he has come to an erroneous decision, I say distinctly

that, even if I should be of a contrary opinion to the Master, I should be very loth indeed to allow of the appeal; but here the Taxing Master has gone upon an erroneous general rule, and I think the appeal must be allowed.

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LINDLEY, L.J.:—

I am of the same opinion, and my reason is a very simple one. The Order of the 26th of April entitles the Appellants to have their costs of and occasioned by their appeal motion taxed and paid. I fail to see how, if the general rule relied on by the Taxing Master were to be applied, this order could ever be carried into effect. Under that rule the costs of the copies furnished to the Appeal Court, which were absolutely necessary for the purpose of the motion then before the Court, but which might never afterwards be wanted, would be disallowed, and the result would be to deprive the successful party of part of those costs which the Appeal Court said he was to have then and there. On that short ground I think that the appeal must be allowed.

Solicitors for Defendants: *Janson, Cobb, & Pearson.*

Solicitor for Plaintiff: *John W. Sykes.*

H. C. J.

### *In re* CAPE BRETON COMPANY.

*Winding-up—Application by Stranger—Bankrupt Contributory—Jurisdiction—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 77.*

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*R.*, a contributory, became bankrupt. After this he took out a summons asking that the official liquidator might be directed to take proceedings against a director to recover sums of money alleged to have been improperly received by him. *Fry, J.*, made an order that on *R.*'s depositing £100 the liquidator should take the opinion of counsel on the case alleged against the director, and on obtaining his opinion should apply to the Judge for directions. Two contributories and creditors who had liberty to attend proceedings appealed from this order:—

*Held*, by the Court of Appeal, that *R.*, having become bankrupt, was a stranger to the company—that there was no jurisdiction to make any order on his application, and that the order must therefore be discharged without any regard to the question whether it was right or wrong on the merits.

AN order was made on the 31st of July, 1875, for winding up the *Cape Breton Company*. *Michael Rooney* was settled on the list of

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contributories. After this, on the 15th of October, 1878, he was adjudicated a bankrupt. No steps were taken in the winding-up against his trustee.

On the 30th of June, 1881, *Rooney* took out a summons asking that the official liquidator might be directed to take proceedings against *Thomas Fenn*, one of the directors of the company, to recover certain large sums of money alleged to have been improperly received by him.

The summons was heard before Mr. Justice *Fry*, in Chambers, on the 11th of July, the official liquidator appearing, and the following order was made :—

“It is ordered that upon the said *M. Rooney* depositing with the official liquidator the sum of £100, he undertaking to return the same to him, or such part thereof, if any, as the Judge shall hereafter direct, the said official liquidator do forthwith proceed to lay a case before counsel and obtain his opinion on what steps, if any, can be taken for the recovery by the said official liquidator from *Thomas Fenn*, one of the directors of the said company, of certain moneys alleged by the applicant to have been improperly received by the said *T. Fenn*, and which, as is alleged, ought to be repaid by him to the said company, and what is the most expedient course to adopt for such purpose ; and it is ordered that upon counsel’s opinion being obtained the official liquidator do apply to the Judge forthwith for directions.” Costs of the application reserved.

*Satterthwaite* and *Twycross*, two of the contributories and creditors of the company, who had liberty to attend proceedings, gave notice of motion to discharge this order. Mr. Justice *Fry*, on the 4th of August, refused the application, holding that as long as *Rooney* was on the list of contributories he was not a stranger, and had a right to apply. *Satterthwaite* and *Twycross* appealed.

Nov. 5. *Davey*, Q.C., and *Farwell*, for the Appellants, having stated the facts, were stopped by the Court.

*Northmore Lawrence*, *contra* :—

This is a mere direction by the Judge to the official liquidator, who is an officer of the Court, to take certain steps on money being deposited no matter by whom.



[JESSEL, M.R.:—The order was made on the application of a person who had no *locus standi*.]

Mr. Justice *Fry* was of opinion that as long as he was on the list of contributories he had a *locus standi*. Moreover, the Judge might give such a direction of his own mere motion.

[JESSEL, M.R.:—No. He might direct the official liquidator to apply, and then make an order on that application, but he could not make the order *ex mero motu suo*.]

The Judge, having the official liquidator before him, gives certain directions, to which the official liquidator does not object, and I submit that a formal application by him was not necessary.

JESSEL, M.R.:—

This order must have been made under some misapprehension. The summons was taken out by a person who had been interested in the liquidation of the company, but had ceased to be so because he had been adjudicated bankrupt. I do not enter into the question whether the order, supposing it to have been made on the application of a person entitled to apply, would be right or wrong, it could not be made on the application of *Rooney*. He is on the list of contributories, it is true, and must remain there; but that does not give him an interest. When a contributory becomes bankrupt his name is not removed from the list, but the 77th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), provides that the trustees in bankruptcy shall represent him, and shall be deemed to be contributories accordingly. He, therefore, is no longer in any way interested. The order, in my opinion, was made without jurisdiction, and must be discharged.

BRETT, L.J.:—

*Rooney*, on whose application this order was made, was at the time of that application a mere stranger. He had been a contributory, but had ceased to be so under sect. 77 of the *Companies Act*. The question, therefore, is, whether the Judge can make an order on a summons taken out by an absolute stranger. The question is one of jurisdiction. In my opinion the Judge, on being informed that the summons was taken out by a stranger,

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was bound to decline to hear it, on the ground that he had no jurisdiction to make an order upon it. The order cannot be supported on the ground that it might have been a proper order to make on the application of somebody else.

LINDLEY, L.J.:—

I am of the same opinion. The question is simply between *Satterthwaite* and *Twycross* on the one side and *Rooney* on the other. Proceedings against *Fenn* might be directed on the application of any one interested in the winding-up if a proper case was made; and, for anything we know, the order may be right on the merits, but the objection that *Rooney* was a stranger appears to me to be fatal to it. If he could apply, so might any other stranger who never had any connection with the company. He had no right to interfere, and an order made on his application cannot be sustained.

Solicitors for *Rooney*: *Harper & Battcock*.

Solicitors for Appellants: *Dollman & Pritchard*.

Solicitors for Official Liquidator: *Norton, Rose, Norton, & Co.*

H. C. J.

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EARL DE LA WARR *v.* MILES.

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[1878 D. 154.]

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Nov. 9.

*Practice—Costs—Short-hand Notes of Evidence.*

19 Ch D 587  
20 QBD 209

The rule is now well settled that the costs of short-hand writer's notes of evidence will not be allowed on taxation unless a direction to that effect has been inserted in the order; for which special application must be made at the hearing. And such a direction will only be inserted in exceptional cases, the Judge's notes, supplemented by those of counsel, being in general a sufficient record of the evidence.

THIS action was originally tried before Vice-Chancellor *Bacon*, on which occasion numerous witnesses were examined in Court. His Lordship decided in favour of the Plaintiff, but his judgment was reversed by the Court of Appeal (1). The question of costs

(1) 17 Ch. D. 535.

was reserved and was argued on a subsequent day, when the Court of Appeal gave the Defendants the general costs of the action and of the appeal. The present application was made by the Defendants for a direction to the Taxing Master in taxing the costs to allow the costs of copies of the short-hand notes of the evidence taken before Vice-Chancellor *Bacon*. No special direction had been given by the Court of Appeal with respect to them, and the order as drawn up contained no such direction.

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*Maidlow*, for the Defendants:—

The short-hand notes are essential, as containing a full and accurate record by an independent person of the evidence. It is true that no application upon the subject was made at the hearing before the Court of Appeal, but so long as the taxation is pending it is competent to the Court to say what they intended to allow to the successful party: *Watson v. Great Western Railway Company* (1); *Lee Conservancy Board v. Button* (2); *In re Bowden* (3).

*Davey*, Q.C., and *Elton*, for the Plaintiff, referred to *Ashworth v. Outram* (4); *In re St. Nazaire Company* (5); *Hill v. Metropolitan Asylums Board* (6).

JESSEL, M.R.:—

The present application is that the costs of making transcripts or copies of the short-hand notes which were taken of the evidence given at the trial should be allowed on this taxation of costs. The first objection is that, according to the settled practice, these costs are not to be allowed unless the Judge or the Court gives a special direction to that effect. That rule was laid down long ago, and I believe that it has been consistently followed since. It appears to me to be a right rule, and, if it had not been laid down before, I should have been disposed to lay it down now. The Judge at the trial, or the Court of Appeal at the hearing before it, would know all about the case, and whether it was one of that exceptional kind which required that short-hand notes of the evidence should be used. As a general rule, the

(1) 6 Q. B. D. 163.

(2) 12 Ch. D. 398.

(3) 1 Ch. D. 698.

(4) 9 Ch. D. 483.

(5) 12 Ch. D. 88.

(6) 28 W. R. 664.

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notes of the Judge are sufficient, and certainly, when supplemented by the notes of counsel, they ought to be amply sufficient. In extraordinary and exceptional cases the Judge can give a direction to allow the costs of short-hand notes. The costs of short-hand notes are very great, and there is no reason for devolving the responsibility of the Judge and the counsel on a short-hand writer, who is not so competent a person. He has not a sufficient knowledge of the case, he is sometimes changed from time to time during the progress of the trial, and he is thus at a very great disadvantage, and must be liable to make mistakes, and, if he does not understand the answer of a witness, he cannot, as the Judge can, ask him to repeat it. It is, therefore, as a general rule, impossible to say that a short-hand writer's note is the most perfect record of the evidence.

Another objection is this—that copies of short-hand notes of the evidence make the costs of counsel's briefs much greater, and lead to the time of the Court being unnecessarily occupied with immaterial evidence. There must, therefore, be a special direction given in the judgment for the allowance of the costs of short-hand notes, and it must be given before the judgment is drawn up. If an application is made while the judgment was in minutes, it will generally come before the same Judge, or Judges, who had heard the case.

In the present case another objection is that the order of the Court of Appeal has been actually drawn up. It was an order of the Court of Appeal, and this Court had no jurisdiction to alter it, even if the Court consisted of the same Judges. Any other course would be very inconvenient. The hearing of the present case occupied several days in both Courts. In the Court of Appeal it was specially heard on the question of costs, the hearing being adjourned for that purpose. The question of costs was then amply discussed and fully considered. That hearing took place before the Lords Justices *James, Brett, and Cotton*; the present application is made to a Court consisting of three different Judges, who, in order to decide whether short-hand notes of the evidence were or were not necessary, must go into all the details of the case, which might occupy them for three or four days. The case is one that shews the utility of the rule that the application must be made at the time of the trial or hearing.



LUSH, L.J. :—

I think that, considering the heavy expense of short-hand notes, it is of great importance that we should adhere to the general rule, that any application for the allowance of the costs of copies of a short-hand writer's notes of evidence must be made at the time of the trial or hearing, and that when the order of the Court contains no direction to allow such costs, the Taxing Master has no discretion to allow them. I agree with the Master of the Rolls that if this rule had not been already laid down we ought to lay it down now, and it is for the interest of suitors that it should not be relaxed. It is the duty of the junior counsel to take a full note of the evidence, and it is the duty also of the Judge to see that he has a full record of it.

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LINDLEY, L.J. :—

I am of the same opinion, and I only wish to add a few words as to the case of *Watson v. Great Western Railway Company* (1), which has been cited. When that case is rightly understood it is perfectly in accordance with our present view. In that case the verdict was found for the plaintiffs, and a rule *nisi* was obtained for a new trial on the ground that the verdict was against the weight of evidence. The plaintiffs had a transcript made of the short-hand writer's notes of the evidence to assist them in upholding their verdict. The rule was discharged, and an application was made to the Court which had heard the matter discussed to allow the costs of the transcript, and they thought that under the circumstances, which were peculiar, they could not have done justice to the parties without a copy of the notes. That was not at all like the present case. Unless the application is made at the time, how can the Court afterwards rehear the case without great inconvenience? The rule having been laid down so long ago we ought to follow it.

Solicitors for Plaintiff: *Horne, Hunter, & Birkett.*Solicitors for Defendants: *Cope & Co.*

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Nov. 23.

HARLOCK *v.* ASHBERRY.

[1880 H. 0354.]

*Practice—Appeal—Security for Costs—Poverty of Appellant—Rules of Court, 1875, Order LVIII., r. 15.*

The fact that an appellant would be unable through poverty to pay the costs of the respondent if the appeal should be unsuccessful is in itself sufficient ground for requiring security for costs.

THE action in this case was tried before Mr. Justice *Fry*, who gave judgment in favour of the Plaintiffs (1). The Defendant appealed from this decision, and the Plaintiffs now applied to the Court to order the Defendant to give security for costs of the appeal.

In support of the application the Plaintiffs filed an affidavit stating their belief that the Defendant was in very poor circumstances, and wholly unable to pay the Plaintiffs' costs of the appeal in case it should be decided against her. They also stated that the Defendant was a woman of very advanced age, living in a cottage which was the subject-matter of the action, without visible means of support, and that on the death of her father she admitted that she was unable to pay the expense of his funeral.

This affidavit was not answered by the Defendant.

*Cozens-Hardy*, in support of the application.

*H. A. Giffard*, for the Defendant:—

Insolvency has repeatedly been held a sufficient ground for ordering an appellant to give security for costs, but there are no reported cases in which mere poverty without anything else has been held sufficient. In the case of insolvency the appellant has ceased to have a personal interest in the action; but if mere poverty should be held a sufficient ground, it would often be a denial of justice. Every suitor has a right to carry his case to

(1) 18 Ch. D. 229.

the Court of Appeal: *Wilson v. Smith* (1); *Ex parte Isaacs* (2); *Rourke v. White Moss Colliery Company* (3); *Waddell v. Blockey* (4).

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JESSEL, M.R. :—

For some time past it has been the settled practice, if the respondent asks for it, to require security for costs to be given by an appellant who would be unable through poverty to pay the respondent's costs of the appeal if it should be unsuccessful. The amount is generally very moderate, and often turns out to be a good deal less than the actual costs. In the present case I think that £30 will not be too large a sum to deposit as security, the case being one in which two counsel have been employed on each side on the original hearing, and in which there are difficult points of law to be argued. With respect to the alleged hardship on the Appellant it must not be forgotten that before the Judicature Acts every appellant in the Court of Chancery had to deposit the sum of £20.

BAGGALLAY, L.J. :—

I am of the same opinion.

LUSH, L.J. :—

Before the Judicature Acts there appears to have been some difference between the practice in the Court of Chancery and in the Common Law Courts. In the Court of Chancery it was the practice to require security to a certain amount for the costs of an appeal to be given in every case. That was not the practice in the Courts of Common Law; there poverty alone was not considered a sufficient reason for requiring security to be given. If the appellant had become either really or technically insolvent, or was out of the country, the Court would order security to be given. In other cases security was not required. If, however, the appellant asked for a stay of execution on the judgment upon his writ of error, he had to give bail for the amount of the judgment; if he did not ask for a stay of execution the writ of error issued as a matter of course. The rule under the *Judicature Act* (rule 15 of Order LVIII.) pro-

(1) 2 Ch. D. 67.

(3) 1 C. P. D. 556.

(2) 9 Ch. D. 271.

(4) 10 Ch. D. 416.

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vides that such security for the costs of any appeal shall be given as may be directed under special circumstances by the Court of Appeal. This was intended to alter the whole practice both of the Court of Chancery and of the Courts of Common Law, and to leave it in the discretion of the Court whether security should be given under special circumstances. I understand that it has been the practice to hold that poverty or inability to pay the costs of the appeal if it should be unsuccessful is a special circumstance. I therefore agree that in this case a deposit of £30 should be made.

Solicitors: *Gregory, Rowcliffes, & Co. ; T. H. Bartlett.*

M. W.

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*Ex parte DAVIES. In re SADLER.*

*Bailor and Bailee—Jus tertii—Estoppel—Sale by Bailor for Bailee after Notice of adverse Claim—Right to Proceeds of Sale—Trustee in Bankruptcy—Auctioneer—Court of Bankruptcy—Jurisdiction—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 72.*

Although in certain cases a bailee may set up the *jus tertii*, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against his bailor.

After the filing of a liquidation petition the holder of a registered bill of sale executed by the debtor instructed an auctioneer to take possession of the chattels comprised in it. The auctioneer took possession, and advertised the goods for sale on behalf of the bill of sale holder. The sale was stopped by injunction, and the auctioneer remained in possession of the goods on behalf of the receiver under the petition. On the appointment of a trustee the auctioneer held possession for him, and ultimately by his directions advertised the goods for sale, the advertisements and the catalogues of the goods being headed "In liquidation. By order of the trustee." The goods were sold, and the proceeds of sale were received by the auctioneer. The bill of sale holder gave him notice not to pay them to the trustee, and he declined to pay them over. The trustee applied to the Court of Bankruptcy for an order for payment to him, serving notice of his motion on the auctioneer only. On the hearing of this motion an order was made by consent that the money should be paid into Court, and the hearing adjourned, notice being meanwhile given to the bill of sale holder. Notice was served on him, but not a four days' notice as required by rule 50 of the Bankruptcy Rules, 1870, and he did not appear on the adjourned hearing. He had meanwhile commenced an action against the auctioneer for the proceeds of sale:—

*Held* (affirming the decision of *Bacon, C.J.*), that the Court of Bankruptcy



ought to exercise its jurisdiction under sect. 72 of the *Bankruptcy Act*, 1869, and that the money must be paid out to the trustee, on the ground that the auctioneer had, with full knowledge of the adverse claim, deliberately elected to sell the goods for the trustee, and was, therefore, estopped from denying his title.

*Biddle v. Bond* (1) distinguished.

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ON the 14th of May, 1881, *John Sadler*, who carried on the business of a confectioner at *Birkenhead*, and also the business of a printer in *Liverpool*, filed a liquidation petition in the *Birkenhead* County Court, and on the 16th of May *Frederick Thompson* was appointed receiver under the petition. He proceeded the same day to take possession of the debtor's stock-in-trade, and other property at his business premises in *South John Street, Liverpool*, and on going there found a man who had been put in possession by Mr. *A. C. Davies*, an auctioneer, under a distress for £20 for rent, on behalf of the landlord of the premises. *Thompson* then arranged with *Davies* that he should hold possession for him also. On the 17th of May *Davies* was instructed to take possession of the property on behalf of one *Frederick Blackett*, who claimed to be entitled to the property under a bill of sale executed by the debtor, which had been duly registered. *Davies* advertised the property for sale on the 30th of May on behalf of the landlord and the bill of sale holder. *Thompson* then applied to the County Court, and on the 26th of May an order was made restraining *Blackett* until the 6th of June from selling the property of the debtor which he had seized under the bill of sale, and directing him, his agents and servants, forthwith to withdraw from possession. The same day *Thompson* gave his personal undertaking to the landlord to pay the £20 rent, and upon this being given the landlord consented to stop the sale, and it was accordingly stopped.

On the 2nd of June the first meeting of the creditors was held under the petition, when a liquidation by arrangement was resolved upon, and a trustee was appointed. On the 4th of June the trustee instructed *Davies'* man, who had remained in possession, to hold possession of the debtor's property for him. Some communications (the exact nature of which was in dispute) then took place between *Davies* and the trustee. *Davies* deposed that

(1) 6 B. & S. 225. *11 Jun 45426*

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he told the trustee that he had received instructions from *Blackett* to advertise the property for sale on the 7th of June, the day after the expiration of the restraining order. Ultimately, however, *Davies* advertised the property for sale on the 14th of June, the bills which announced the sale and the catalogues of the goods being headed, "In liquidation. By order of the trustee." The property was sold on the 14th of June for £80 15s. 9d., and out of this sum *Davies* paid £20 to the landlord. The trustee applied to *Davies* for payment of the proceeds of sale, and *Davies* told him that *Blackett* had given him notice to pay them over to him. On the 18th of June the trustee served on *Davies* notice of an application to the County Court on the 24th of June for an order that he should pay over the proceeds of the sale to him. On the 20th of June *Davies* sent to the trustee an account of the proceeds, in which he charged him with possession money for fourteen days to the 15th of June. On the 24th of June the Registrar of the County Court made an order by consent that *Davies* should pay into Court the balance of £60 15s. 9d. which remained in his hands, and that the further hearing of the application should be adjourned to the 5th of July, and that notice should in the meantime be given by the trustee to the bill of sale holder. No notice was given to *Blackett* four clear days before the 5th of July, as required by rule 50 of the Bankruptcy Rules, 1870, but notice was actually given to him on the 1st of July. He did not, however, appear on the adjourned hearing on the 5th of July. He had meanwhile commenced an action against *Davies* for the proceeds of sale. On the 5th of July the Judge made an order that the money in Court should be paid out to the trustee.

From this order *Davies* appealed to the Chief Judge. The appeal was heard on the 1st of August, 1881.

*Finlay Knight*, for the Appellant.

*W. Pickford* and *J. Gatey*, for the trustee.

BACON, C.J., dismissed the appeal, with costs.

J. B. D.

C. A. *Davies* appealed. The appeal was heard on the 24th of November, 1881.

*Horton Smith*, Q.C., and *E. Cooper Willis*, for the Appellant:—

The order may inflict great hardship on the Appellant; he will probably have to pay the money over again to *Blackett*. The Appellant was acting as an officer of the Court, and the Court will protect him: *Ex parte Sheriff of Middlesex* (1). At any rate it will not press a mere technicality against him. The Judge, in effect, set aside the previous order of the Registrar which directed that notice of the application should be served on *Blackett*. No proper notice was given in accordance with rule 50 of the Bankruptcy Rules, 1870; there should have been a four days' notice. The trustee had full notice of *Blackett's* claim, and it has been disregarded without any consideration of the validity of his bill of sale. Even if the trustee is technically in the right, the Court will not allow its own officer to act inequitably: *Ex parte James* (2). Moreover, this is a mere money demand against a stranger to the liquidation, and the Court of Bankruptcy ought not in such a case to exercise its jurisdiction under sect. 72: *Ex parte Dickin* (3); *Ex parte Musgrave* (4). And, even at law, the adverse claim of *Blackett* would be a sufficient defence to the Appellant as against the trustee's demand for the proceeds of sale: *Biddle v. Bond* (5).

*Winslow*, Q.C., *W. Pickford*, and *J. Gatey*, for the trustee, were not heard.

JESSEL, M.R.:—

This is an appeal from a decision of the Chief Judge affirming a previous decision of the Judge of the County Court at *Birkenhead* whereby he ordered that a sum of money, the proceeds of the sale of goods belonging to a liquidating debtor, which had been sold by the Appellant, an auctioneer, and which he had been directed to pay into Court, should be paid out to the trustee in the liquidation.

The substantial question which has been argued before us is, whether the auctioneer is entitled to protection against a claim to

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(1) Law Rep. 12 Eq. 207. /

(3) 8 Ch. D. 377.

(2) Ibid. 9 Ch. 609.

(4) 10 Ch. D. 94.

(5) 6 B. & S. 225.

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the money which has been brought forward by the holder of a bill of sale of the goods. It is said that the order inflicts grievous injustice on the auctioneer, because he may be compelled to pay the money over again to the bill of sale holder. I cannot help thinking that the appeal has been to a great extent caused by the very large sum which the Appellant has been ordered to pay for costs. The bill of costs in the County Court amounted, as brought in, to more than £52, and it has been taxed at £40. I am painfully surprised at seeing such an amount of costs incurred in a single application to a County Court. There are in addition to this the costs of the appeal to the Chief Judge, and it is obvious that the total amount of the costs must considerably exceed the value of the claim.

With regard to the question in dispute, I agree that, as a general rule, a bailee of goods cannot dispute the title of his bailor. There are, no doubt, cases in which goods have been taken from a bailee by a third party, who claimed them by title paramount, and, if there has been no fault on the part of the bailee, it has been held that this is a good excuse to him as against his bailor. An illustration of this is the old case of *Shelbury v. Scotsford* (1), in which a stolen horse had been bailed by the thief and had been forcibly taken away from the bailee by the rightful owner, and it was held that the thief could not maintain an action of trover for the value of the horse against the bailee, on the ground that the eviction of the horse out of his possession was a discharge in law of his promise to return it to his bailor. But, in order that the bailee may be able to avail himself of such a defence, he must himself have been in no default. If the bailee, knowing of the adverse claim, had said to his bailor, I will sell the horse for you if you will let me have a commission, and I will hand over the proceeds to you, he could not have afterwards set up against his bailor the title of the adverse claimant, because he would have acted with his eyes open. The questions to be decided, therefore, are, 1. whether the bailee has precluded himself from setting up the title of the adverse claimant; 2. whether he can succeed at all without proving the title of the adverse claimant. It is not enough for him merely to

(1) Yelv. 22.



say that such a claim is made. It appears to me that the Appellant fails on both points. He endeavoured to act for both parties, and I am afraid he has met with the usual fate of those who try to serve two masters having adverse interests. There is some conflict in the evidence as to what took place, but that which is in writing is quite clear. The auctioneer put up the goods for sale, as the advertisements and catalogues stated, by the order of the trustee in the liquidation, and he afterwards sent in an account to the trustee, in which he charged him possession money for fourteen days to the 15th of June. He has, therefore, by his own act precluded himself from setting up the adverse claim of the bill of sale holder. Again, has the Appellant proved the title of the adverse claimant? He has not. Either the bill of sale holder should have come forward himself and have proved his own title, or the Appellant should have proved it for him. It is not enough for a bailee to say, Somebody else makes a claim to the goods; he must prove a title paramount in the adverse claimant. Then it was said that the Court of Bankruptcy had no jurisdiction to decide the question, or rather that it ought not to exercise its jurisdiction, there being a simple money demand by the trustee against a stranger to the liquidation. No doubt the words of sect. 72 are large enough to give the Court jurisdiction. But the Court of Appeal has said that when such a claim is made by a trustee in bankruptcy against a stranger to the bankruptcy, who asserts his right to have the matter investigated before the ordinary tribunals, it would not be proper for the Court of Bankruptcy to exercise jurisdiction, even if it possesses it. But that is not the present case. The auctioneer, it is true, is not an officer of the Bankruptcy Court. But he did not in the first instance say that he desired to have an action brought against him in the High Court; on the contrary, he submitted to an order to pay the money into the Court of Bankruptcy. I agree that in pursuance of that order notice of the application ought to have been given to the bill of sale holder, and notice was actually given to him, though it was one day short. It is said, however, that the Judge ought not to have decided against the auctioneer, when he could see that he might have to pay the money over again. For this purpose the fact that the bill of sale holder had actual notice of the application was a matter to be taken into account. In

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determining whether the Judge should exercise his extraordinary or extra-judicial discretion the case could not be treated as if the bill of sale holder had had no notice at all, merely because the notice given to him was one day short, and if the Judge was satisfied, as I am, that the bill of sale holder had no intention of coming forward, I can see no reason for his departing from the strict rule. I think, therefore, that the order was right.

BAGGALLAY, L.J.:—

One thing is certain, that the sale took place under the order of the trustee, for the catalogues and posters so stated. There can be no question (but for that which I shall presently refer to) that the auctioneer, who was the bailee of the trustee, could not set up against him the title of a third person. It is said, however, that the Appellant had previous notice of the claim of the bill of sale holder. But the bill of sale holder had been restrained from proceeding under his bill of sale, and the Appellant, with full notice of his claim, accepted the retainer of the trustee and acted upon it. How the case might have stood if the Appellant, having notice of the claim of the bill of sale holder, had, after the sale, and before the payment of the proceeds into Court, insisted on an action being brought against him by the trustee, it is not necessary to say; the money was paid into the Court of Bankruptcy, and thereupon the full jurisdiction of that Court attached.

LUSH, L.J.:—

The application to the County Court was simply to have the money, which the auctioneer had paid into Court as the proceeds of the goods which he had sold, paid out to the trustee; the only parties to it were the trustee on the one hand, and the auctioneer on the other. The bill of sale holder was not before the Court at all; he had had notice, and did not choose to intervene. It is not necessary now to say whether his claim is a valid one; the only question is whether the money ought to be paid out to the trustee, and I have no doubt that it ought. The intended sale under the instructions of the bill of sale holder was stopped by the Court; the trustee asserted his claim, and the auctioneer, with full knowledge of the other claim, elected to take the part of the trustee. He knew what the title of the bil

of sale holder was, and he knew what the title of the trustee was. In substance, what passed between him and the trustee was this, If you will authorize me to sell the goods on your behalf, I will undertake to hand over the proceeds of sale, less my commission, to you. I am of opinion that when a person in such a position, knowing of two adverse claims to goods, elects to take the part of one of the claimants and to sell the goods as his, he is estopped from afterwards denying that claimant's title. If he had not taken this course he would have been entitled to shew that there was a better title in the bill of sale holder; there might have been what is called an eviction of the trustee by title paramount. But if we were now to decide in the Appellant's favour, it would be a decision without a tittle of evidence in support of the bill of sale holder's title. This distinguishes the present case from that of *Biddle v. Bond* (1) which has been cited. There notice of the adverse claim was given to the auctioneer when the sale was just about to commence, and he did not elect in favour of one of the claimants, but merely sold the goods under the authority which had been already given to him by his bailor. The bailor afterwards sued the auctioneer for the proceeds of sale, and he defended the action, relying on the right, and by the authority of the adverse claimant, and he shewed, not only that he had had no opportunity of electing between the two claims, but that the adverse claimant had a title paramount to the goods, and that the person who had employed him to sell them had no title whatever, and that he himself had done nothing wrong. In the present case the auctioneer deliberately elected to sell the goods for the trustee, with full knowledge of what the title of the adverse claimant was, and he has not shewn that that claimant has a better title than the trustee. On both grounds, therefore, I think that the order of the Chief Judge was right.

Solicitor for Appellant: *H. G. Field*, agent for *T. Etty, Liverpool*.

Solicitors for Trustee: *J. & E. Scott*, agents for *J. T. Thompson, Birkenhead*.

(1) 6 P. & S. 225. *Wm. Nichol*  
W. L. C.

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V.-C. B.

July 22.

C. A.

Nov. 4.

## SCHJOTT v. SCHJOTT.

[1881 S. 2625.]

*Practice—Married Woman suing by her next Friend—Authority—Security for Costs.*

An action was commenced in the name of a married woman by her next friend against her husband and the trustee of a separation deed to enforce payment of an annuity under the deed. The Defendants moved that the action might be dismissed, or that the next friend might be ordered to give security for costs. This was supported by an affidavit of the husband that he believed that his wife had given no authority to commence the action. The husband's solicitors joined in the affidavit, and deposed to the facts that the next friend was not a householder, and had no visible means of paying costs. The next friend replied by affidavit that he had sufficient means to pay any costs that he might be ordered to pay, but said nothing as to his having authority from the married woman to commence the action, and did not produce any authority:—

*Held*, by *Bacon*, V.C., that the next friend of a married woman will not be called upon to prove his authority on the mere allegation of a defendant that he has no authority:

*Held*, also, that the next friend could not be ordered to give security for costs on the ground that he was not a householder when he deposed that he had sufficient means to pay costs.

*Held*, by the Court of Appeal, that the action must be dismissed with costs, to be paid by the solicitors of the next friend, as he, when challenged to shew his authority to commence the action, did not shew any.

THIS was an action by *Marian Schjott*, by *R. W. Maude*, her next friend, against her husband and *F. Smith*, the trustee of a separation deed, to recover instalments of an annual sum payable by the husband under the deed.

By the deed it was stipulated that the wife should keep the husband informed of her place of residence.

The Defendants moved that the action might be dismissed with costs, or that the next friend might be ordered to give security for costs. In support of this application an affidavit was filed, made by the husband, the trustee, and one of their solicitors, by which the husband deposed that he had never heard of *Maude's* name till the commencement of the action, and did not believe that the Plaintiff was acquainted with him, and that he believed that *Maude*



was a total stranger to the Plaintiff, and had never been instructed by her to commence the action. He further stated that he had never been applied to for payment of the instalments, and that he had received a letter from the Plaintiff purporting to be written from *Chicago*; that he had commenced proceedings for the dissolution of his marriage, and had forwarded the citation to *Chicago* to be served, but that, as he was informed, the wife could not be found there. The trustee deposed that the Plaintiff had not applied to him for payment of any instalments under the separation deed—that he had not heard from her since October, 1880, and did not know where she was except that he was informed and believed that she was somewhere in the *United States*. The solicitor deposed that *Maude* was not a householder, and had no visible means of paying costs.

In answer to this affidavit *Maude* filed an affidavit, by which he deposed that he was in a position to pay any costs which he might be ordered to pay in the action, and that he was advised and believed that the Defendants had no defence to the action, and that their application for security for costs was made simply for the purpose of delay. He did not allude to the question whether he had any authority to commence the action. An affidavit was also filed by the managing clerk of the Plaintiffs' solicitors, but it was silent as to the authority to commence the action.

1881. July 22. *Farwell*, for the motion :—

I ask the Court to dismiss the action on the ground that no authority has ever been given by the Plaintiff to *Maude* to act as her next friend. He has been challenged to produce his authority, and is silent.

If the Court declines to do this, I ask that *Maude* may be called upon to give security for costs. A next friend of a married woman must be a substantial person, and capable of answering the costs of the suit: *Hind v. Whitmore* (1). This application is made on behalf of defendants. Such an application was made in *Hubbart v. Phillips* (2), where an attorney had brought an action without

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(1) 2 K. & J. 458.

(2) 13 M. & W. 702.

C. A. the authority of the plaintiff; and again in *Hall v. Bennett* (1),  
 1881 and in *Cape Breton Company v. Fenn* (2).

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BACON, V.C.:—

It is new to me that a next friend is to be interrogated as to his authority. I know of no case where the next friend of a plaintiff has been compelled, on the application of a defendant, to give his authority—at any rate without a case made. I cannot follow the reasoning. If a wife should come forward and say, I never gave my authority to so and so to act as my next friend, that is intelligible; but until somebody comes forward and says that no authority was given, and proves the statement, what attention can I pay to the suggestion? I cannot stop the suit from going on.

As to putting the alleged friend upon terms of giving security, I will hear what the Plaintiff has to say upon that.

*Higgins, Q.C., and R. W. Andrews, for the Plaintiff:—*

No authority has been produced for such an application. In *Robertson v. Robertson* (July 19, 1881), which was a petition by a husband for dissolution of marriage on account of the adultery of the wife, upon which the Divorce Court had pronounced a judgment dissolving the marriage on the ground of the wife's adultery—even in that extreme case the Court of Appeal considered that a wife, who had no property of her own, ought to have her means of defence supplied by her husband; and that her full costs ought to be allowed. Here not only has no decree been obtained, but the evidence of any misconduct on the part of the Plaintiff is of the most ambiguous kind, and we have the covenant of the Defendant the husband to pay her this money.

*Farwell, in reply:—*

Our complaint is that the address of the wife is, in direct breach of the covenant in the deed, kept from us, so that we cannot serve citation, and obtain the decree which we otherwise should obtain. In *Pennington v. Alvin* (3) the Court refused to let the cause pro-

(1) 2 S. & S. 78.

(2) 17 Ch. D. 198.

(3) 1 S. & S. 264.

ceed, without security for costs being given by the next friend, on the ground that the next friend ought to be a person of substance : see remarks in *Hind v. Whitmore* (1). The Court can now direct security for costs to be given at any stage of the proceedings : *Martano v. Mann* (2).

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BACON, V.C. :—

The next friend says he is competent to pay the costs, and the mere fact that he is not a householder is not a sufficient answer to that statement.

The Defendant is the last person who should make an application of this kind. He has the annuity in his own hands. This is the wife's only means of support ; it is the bread she eats. I dismiss the so-called evidence of the Plaintiff's adultery. If the Defendant has a good answer to the case made against him, he has the fund in his own hand, and can pay himself the costs.

The costs of this application I order to be costs in the cause.

J. B. D.

The Defendants appealed. The appeal was heard on the 4th of November.

C. A.

*Farwell*, for the appeal :—

The husband deposes to his belief that the married woman has given no authority to commence this action, and the next friend though he has answered the affidavit, is silent on this point. If he has any authority he can easily shew it.

[He was then stopped by the Court.]

*Higgins*, Q.C., and *B. W. Andrews*, *contra* :—

There is no precedent for calling on the next friend of a married woman to shew his authority at the instance of the defendants, nor for dismissing the action, unless it is shewn by the affidavit of the married woman that she disapproves of it.

JESSEL, M.R. :—

It is plain that in this case the action was commenced without

(1) 2 K. & J. 458, 459, 460.

(2) 14 Ch. D. 419.

C. A. any authority from the married woman, and it must therefore be  
 1881 dismissed with costs both here and below, to be paid by the  
 SCHJOTT solicitors of the next friend.

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BAGGALLAY, BRETT, and LINDLEY, L.JJ., concurred.

Solicitors for Defendants: *Stokes, Saunders, & Stokes.*

Solicitors for Plaintiffs: *Best, Webb, & Templeton.*

H. C. J.

C. A.

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1881

*Bill of Sale—Statement of Consideration—Bills of Sale Act, 1878 (41 & 42  
 Vict. c. 31), s. 8.*

C. J. B.

June 20

C. A.

Nov. 10.

A bill of sale of chattels, dated the 23rd of March, was expressed to be made "in consideration of £50 by the assignee paid to the assignor at or before the execution hereof." In fact only £21 10s. was paid to the assignor on the execution of the deed, £3 10s. being retained by the assignee for the expenses of the deed, and £25 being also retained and paid by him on the 30th of March to the landlord of the assignor's house, in which the chattels comprised in the deed were, for two quarters' rent for the quarters ending respectively the 25th of March and the 24th of June. The rent of the house was payable quarterly, but there was nothing to shew that it was payable in advance. The £3 10s. and the £25 were retained upon the written request of the assignor dated the day of the execution of the deed. On the 25th of April the assignor filed a liquidation petition, and the trustee in the liquidation claimed the goods, on the ground that the consideration for the deed had not been stated in it in compliance with sect. 8 of the *Bills of Sale Act, 1878* :—

*Held* by the Court of Appeal (reversing the decision of *Bacon, C.J.*), that the consideration was not truly stated in the deed, and that it was, therefore, void as against the trustee, 1. because the £25 was not paid to the assignor, but only agreed to be paid on his behalf; 2. because, even if the £25 were taken to have been paid to the assignor, it was not paid "at or before the execution" of the deed.

*Ex parte National Mercantile Bank* (1) and *Ex parte Challinor* (2) explained.

ON the 23rd of March, 1881, *William Spindler*, a coal merchant at *Headington Quarry*, near *Oxford*, executed a bill of sale of his furniture and other chattels in favour of *Thomas Nicholson*. The deed was expressed to be made "in consideration of the sum of

(1) 15 Ch. D. 42.

(2) 16 Ch. D. 260.

19 Ch D 422  
 425  
 21 Ch D 546  
 549



£50 by the assignee paid to the assignor at or before the execution hereof." In fact only £21 10s. was paid to *Spindler* by *Nicholson* on the execution of the deed. £3 10s. was retained by *Nicholson* for expenses connected with the bill of sale, and £25 was retained by him, and was on the 30th of March paid by him to the landlord of the house in which *Spindler* lived for two quarters' rent in respect of the quarters ending the 25th of March and the 24th of June, 1881. This was done in accordance with the following letter addressed to *Nicholson* and signed by *Spindler* on the 23rd of March, 1881:—

"Please deduct the sum of £3 10s. from the amount of £50 which I have this day borrowed from you, this said sum being the amount of your expenses for registering, filing, and other expenses in connection with the bill of sale given by me to you this day; and I request you to forward the amount of rent now due for my house at *Headington Quarry*, viz., £25, to Mr. *John Collett*, the landlord, and hand me over the balance, viz., £21 10s."

It was alleged that by the terms of *Spindler's* tenancy of his house his rent was payable quarterly and in advance, but there was no evidence to shew that it was payable in advance.

On the 20th of April, 1881, *Nicholson*, in exercise of the powers given to him by the bill of sale, took possession of the property comprised in it, and on the 25th of April *Spindler* filed a liquidation petition in the *Oxford County Court*, under which a trustee was appointed. The Judge of the County Court held that the bill of sale was void as against the trustee, on the ground that the consideration for it was not truly stated therein in compliance with sect. 8 of the *Bills of Sale Act of 1878*.

*Nicholson* appealed to the Chief Judge. The appeal was heard on the 20th of June, 1881.

*E. Cooper Willis*, for the Appellant:—

In *Ex parte Challinor* (1) it was decided that a grantee, being a solicitor, might retain out of the advance £40 in payment of his costs of that and previous transactions, for which a bill had not been delivered, and £20 which had been paid to a valuer for

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the purpose of the loan. This authority completely rules the present case as to the £3 10s., which was deducted by direction of the grantor for "registering, filing, and other expenses."

As to the £25, it was a collateral arrangement directed by the grantor to be made for his benefit, and no recital of it was necessary. There is no dispute as to the validity of the authority given by the letter of the 23rd of March.

*F. A. Broxholm*, for the trustee :—

The case is governed by the decision in *Ex parte Charing Cross Advance and Deposit Bank* (1). There the grantor retained a sum for "interest and expenses," and the bill of sale was declared void. So in *Hamilton v. Chainé* (2), where the retainer was first, in respect of a debt due by the grantor to a creditor who was paid out of the advance; secondly, for solicitor's charges in respect of the bill of sale; and, thirdly, of a sum retained by the grantor for "commission on the loan, and expenses connected therewith."

The letter of the 23rd of March cannot be read in connection with the deed: *Ex parte Charing Cross Advance and Deposit Bank*.

BACON, C.J. :—

The simple question in this case is whether the consideration for which the bill of sale was given is set forth within the meaning of the 8th section of the *Bills of Sale Act*, 1878.

The order of the County Court has declared the deed to be void, it being admitted that £3 10s. was retained by the grantee by the grantor's direction for registration, filing, and other expenses, and that £25 was not paid to the grantor, but to his landlord at his request. I have heard no question as to the validity of the authority given to make these payments. The rent was a debt due from the borrower; and the £25 was paid on behalf of the borrower in satisfaction of that debt. As to the £3 10s., it is the universal practice that the mortgagee should pay the expenses of the mortgage deed, and the sum was paid by the grantor's direction. Where is the falsity of the statement that the bill of sale

(1) 16 Ch. D. 35.

(2) 7 Q. B. D. 1, 319.

was given in consideration of £50? This is not like the case of *Ex parte Charing Cross Advance and Deposit Bank* (1), where a sum for interest and a sum for expenses were lumped together, and taken out of the sum of money advanced. The true "consideration" for a bill of sale has been defined by the Court of Appeal; it means that which in point of law is the consideration for the giving of the instrument: *Ex parte Challinor* (2). All that the statute requires is that the consideration shall be set forth; it does not require that every collateral transaction entered into by the grantor should be stated.

I can see no ground for disturbing this instrument. In my opinion it is a good bill of sale, and the order which declares it to be bad must be discharged, with costs here and below.

J. B. D.

From this decision the trustee appealed. The appeal was heard on the 10th of November, 1881.

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*Ex parte*  
ROLPH.

*In re*  
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*Winslow*, Q.C., and *F. A. Broxholm*, for the Appellant:—

The consideration is not truly stated in the deed. It is said to be £50 paid to the grantor "at or before the execution" of the deed. In fact, he then received only £21 10s.; the rent which was deducted was not then due.

[They were stopped by the Court.]

*E. Cooper Willis*, for *Nicholson*:—

It is not necessary that the consideration should be paid to the grantor himself; it is sufficient if it is applied by his direction in discharging a debt for which he is liable: *Ex parte National Mercantile Bank* (3); *Ex parte Challinor* (4). And these cases shew also that the expenses of the deed may be retained. The question is whether the transaction is or is not a sham. Here the grantor got the benefit of the whole consideration, and that is enough. The decision in *Hamilton v. Chaine* (5), by which the

(1) 16 Ch. D. 35.

(2) *Ibid.* 260, 265.

(3) 15 Ch. D. 42.

(4) 16 Ch. D. 260.

(5) 7 Q. B. D. 1, 319.

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County Court Judge felt himself bound, is not really consistent with the other decisions of this Court.

JESSEL, M.R. :—

I am of opinion that the cases which have been cited do not compel us to construe the Act otherwise than according to its natural meaning. The Act says that the consideration for a bill of sale shall be set forth, that is, truly set forth in the deed, otherwise the deed shall be void as against the trustee in bankruptcy of the assignor. What was the real consideration for the deed in the present case? It was (I will pass over the expenses of the deed) partly a payment of money to the borrower, and partly an agreement by the lender to pay £25 for rent to the borrower's landlord. £25 was not due for rent at the time of the execution of the deed; no rent at all became due till the 25th of March, and then only £12 10s. But, assuming that the whole £25 became due for rent on the 25th of March, the money was not paid till the 30th of March. Did the borrower ever receive the £25, or have a chance of receiving it? Certainly not. The meaning of the transaction was this;—the lender did not wish to trust the borrower with the money, he wished to avoid the chance of a distress for rent being levied by the landlord upon the goods which were comprised in the deed, and which formed his security for the loan. That is the substance of the transaction, and, that being its real nature, is the consideration truly stated in the deed? The consideration was so much money then paid by the lender to the borrower, and a covenant or agreement by him to pay a further sum at a future day to some one else, and that ought to have been stated in the deed. On this ground, therefore, it appears to me that the consideration is not stated in the deed as required by the Act. Another ground for so holding is this: In the deed the £50 is stated to have been paid to the borrower "at or before the execution hereof," and £25 of it was not paid at all till seven days afterwards. Though the word "at" has been held to have a somewhat elastic meaning, it has never, so far as I know, been stretched to such an extent as to include a payment made so long afterwards. There was no independent contract that the payment should be



delayed; there was a request by the borrower to the lender to pay the £25 and an agreement by the lender to pay it. There was no payment of it at the execution of the deed; there was nothing more than a contract by the lender to pay it. In my opinion the Act has not been complied with.

Are we then compelled by the authorities to decide differently? I think not. Two cases were mainly relied on by the Respondent. In one of them, *Ex parte National Mercantile Bank* (1), the money stated as the consideration was actually handed to the borrower in bank notes and gold, and the question was whether that was the real consideration. The Court of Appeal held that it was the real consideration, that the money stated to have been paid to the borrower was actually paid to him, and that the bargain as to the application of the money was a merely collateral bargain. Whether they were right or wrong in that conclusion is immaterial; the question was one of fact, and, that being their conclusion of fact, they decided that there was nothing in the Act requiring that a collateral bargain should be stated in the deed. That case has no application to the present. *Ex parte Challinor* (2) is, no doubt, more difficult to distinguish from the present case. But there again the question decided was really only one of fact. The lender, who was the borrower's solicitor, retained out of the sum stated as the consideration the expenses of preparing the deed and some costs which were due to him by the borrower for business previously transacted, and also a sum of £20 which he paid to an auctioneer for valuing the property. The Court came to the conclusion that the deduction was made in pursuance of a prior agreement that these sums should be paid out of the loan, and that consequently the handing of the money to the borrower and the handing of it back by him to the lender was immaterial. This was a conclusion of fact. It only came to this, that if the consideration which was stated had been handed in notes and cash to the borrower and then handed back by him, the consideration would have been truly stated in the deed, and would have been paid to him, and that the handing over of the money and the handing of it back again was a mere matter of form. Moreover, the sum retained was but small in proportion

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(2) 16 Ch. D. 260.

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to the amount secured by the deed. I agree that the decision in *Ex parte Challinor* (1) was right under the particular circumstances of the case. But neither of these cases when carefully considered supports the proposition that anything in the shape of a *bonâ fide* loan of which the borrower gets the benefit is sufficiently stated as the consideration for a bill of sale if it is described as a cash payment. I think that that was not the intention of the Act, and that we should be repealing it if we were so to construe it.

LUSH, L.J. :—

I am entirely of the same opinion. Our decision in *Ex parte Challinor* in no way conflicts with this view; the two cases are perfectly distinguishable. I think that the transaction in the present case was a mere sham, a device by the lender to protect his own goods from being taken under a distress by the borrower's landlord and so to better his own security. We should be defeating the object of the Act if we were to hold such a transaction good.

LINDLEY, L.J. :—

I am of the same opinion. Independently of authority, it would be a strong thing to say that the money was paid "at or before the execution" of the deed; it cannot be made so except by a most ingenious twisting of arguments. The £25 was not paid at all at the execution of the deed; it was kept back by the lender for future rent of the borrower's house and for his own better security. It was not paid to the borrower in any sense. The statement that the £50 was paid was not true in fact. It is said, however, that the decided cases shew that you may depart a little from the exact truth, and that if the consideration which is stated is not paid in cash, but is applied *bonâ fide* at the request of the borrower in the discharge of his debts and liabilities, the requirement of the Act will be satisfied. But it would be very wrong, I think, to extend those decisions to such a case as the present. They were decisions in somewhat anomalous cases, and they cannot, I think, be stretched so as to apply to the present case. In *Hamilton v. Chaine* (2) the Queen's Bench Division

(1) 16 Ch. D. 260.

(2) 7 Q. B. D. 1, 319.

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refused to extend them, and their decision was affirmed by the Court of Appeal. I agree that the present appeal must be allowed.

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Solicitor for Appellant: *Crews Dudley*, agent for *G. D. D. Dudley*,  
*Oxford*.

Solicitor for Respondent: *Wakeford May*.

W. L. C.

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*Proof in Bankruptcy—Secured Creditor—Deduction of Value of Security—  
Security on Lease of Bankrupt and former Partner.*

C. J. A.  
July 25.

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The rule as to what securities a secured creditor of a bankrupt is bound to value and deduct on proving against the bankrupt's estate, explained.

Two partners, who were interested in equal shares in the business of the partnership, dissolved partnership. They had carried on business at some mills, of which they held a lease, granted to them, their executors, administrators, and assigns. On the dissolution, the partnership assets, other than the lease and the fixtures, were divided equally between the two partners. It was agreed that one of them should be entitled to carry on the business for seven years on his own account, and that he should pay the debts of the firm and indemnify the retiring partner against them. The retiring partner lent the other the value of his moiety of the partnership assets (other than the lease and fixtures) and granted him a lease for seven years of his moiety of the mills and fixtures. The original lease was deposited by the continuing and the retiring partners with the bankers of the former, as security for the balance which might for the time being be due from him to them, it being expressly provided that the retiring partner should be liable to the bankers only as a surety for the other. The continuing partner, before the end of the seven years, filed a liquidation petition.

*Held*, that, as to a moiety of the lease and fixtures, the bankers' security was upon separate estate of the liquidating debtor, and that, before proving in the liquidation for the balance due to them by him, they must deduct a moiety of the value of the lease and fixtures.

Decision of *Bacon*, C.J., affirmed.

BY articles of agreement, dated the 8th of April, 1853, *Joseph Brooke Turner* and *Josiah Berry* agreed to become partners in the business of woollen cloth manufacturers as from the 1st of December, 1853, for a term of fifteen years. The articles provided that the business should be carried on at some mills and premises to be

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erected at the expense of the partnership upon a plot of land in respect of which an agreement had been entered into with the owner for a lease to *Berry* and *Turner* for a term of 999 years. The profits and losses of the business were to be divided between and borne by the partners in equal shares. In pursuance of these articles the mills were erected, and on the 30th of August, 1856, a lease of the mills and the land upon which they stood was granted by the landowner to *Berry* and *Turner*, to hold to them, their executors, administrators, and assigns, for a term of 999 years from the 25th of March, 1856. The mills were known as the *Albert Mills*. *Berry* and *Turner* continued to carry on the business in partnership down to the 1st of May, 1875, and on the 1st of June, 1875, they entered into an agreement for the dissolution of the partnership as from the 1st of May, 1875. This agreement contained recitals that a balance sheet of the partnership had recently been made out and agreed to by the partners, and that the total value of the partners' interests had been agreed at the sum of £40,000, of which £34,000 was the value of the mills and premises and the machinery and fixtures attached thereto; that a moiety of the £40,000 (exclusive of the value of the mills and premises, machinery and fixtures) had been received by *Berry*; that the partners had agreed to dissolve the partnership; and that it had been agreed that *Berry* should lend *Turner* the sum of £3000, to be repayable with interest, and should grant him a lease of his (*Berry's*) moiety of the mills and premises and the machinery and fixtures, for the term of seven years from the 1st of May, 1875. And it was thereby agreed that the partnership should be dissolved as from the 1st of May, 1875; that *Berry* would on request assign to *Turner*, his executors, administrators, and assigns, his moiety of the estate and effects of the partnership, except the mills and premises and the machinery and fixtures of which a lease was to be granted; that *Berry* would concur with *Turner* in depositing the original lease of the mills with any banker or other person by way of security for, or as an equitable mortgage for securing any sum or sums of money to be advanced to or become due from *Turner* (not exceeding in the whole at any one time the sum of £15,000), so as to give *Turner* in his carrying on of the business the benefit of the banking advance on the



security of the entire leasehold premises, but of which sum, as between *Berry* and *Turner*, *Berry* should only be chargeable with a moiety thereof, and *Berry* should not in any other way or to any other extent become liable to any such banker or other person, nor should the said deposit security or liability continue after the expiration of seven years from the 1st of May, 1875; that *Turner* should be entitled to carry on the business on his own account as from the 1st of May, 1875, and he thereby agreed during the period of seven years from that date to render to *Berry* yearly, on the 1st of June, true and accurate accounts and balance sheets of the state and condition of the business up to the 1st of May immediately preceding. It was further agreed that if by any of these yearly accounts it should be ascertained that *Turner's* capital in the business as it appeared on the 1st of May, 1875, had been reduced by the sum of £4000 or upwards, then immediately thereupon, but within six months of the date up to which the account should be taken, the £3000 should be payable to *Berry*, and the guarantee or security by deposit of the lease should cease, and the same should be satisfied by *Turner* out of his own funds, and the lease for seven years and the term thereby created should absolutely cease, and the mills, machinery, and fixtures should be sold and the proceeds of sale divided between *Berry* and *Turner*, in the shares in which they were entitled to the same, provision being made by *Turner* for the payment of all claims against him which affected the lease or anything included therein. *Turner* also agreed to pay all the debts of the firm with all convenient speed, and to perform all its other engagements, and to indemnify *Berry* against them.

On the same day *Berry* executed an underlease, by which he demised to *Turner*, his executors, administrators, and assigns, his (*Berry's*) moiety of and in the mills, premises, and machinery, for the term of seven years from the 1st of May, 1875. By this deed *Turner* covenanted to pay the rent thereby reserved, and also to pay the whole of the ground rent reserved by the original lease, and to perform and observe all the lessee's covenants therein contained, and to indemnify *Berry* against the ground rent and covenants.

The firm, down to the time of the dissolution, kept their bank-

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ing account with the *West Riding Union Banking Company*, and at the date of the dissolution there was, in addition to debts due to other creditors of the firm, a large debt due by the firm to the *Banking Company*. After the dissolution *Turner* continued the business of the firm on his own account alone as *J. B. Turner & Co.*, but the mill, machinery, and fixtures remained the property of *Berry* and *Turner*. The banking account of the firm was closed, and was carried over to the account of *J. B. Turner & Co.*

On the new banking account being opened the original lease of the mills was deposited by *Berry* and *Turner* with the *Banking Company*, accompanied by a memorandum of deposit dated the 30th of June, 1875, and signed by *Berry* and *Turner*. This memorandum contained a recital that the lease was deposited for the purpose of securing payment to the *Banking Company* of the balance, not exceeding £15,000, which on the account of *J. B. Turner*, trading as *J. B. Turner & Co.*, with the *Banking Company* should for the time being be due or owing for bills or notes discounted or paid, or other loans, credits, or advances made to him or for his accommodation or at his request, or for interest or commission or other lawful charges and expenses. And *Berry* and *Turner* thereby agreed, when called upon by the *Banking Company*, to execute a legal mortgage to them of the property comprised in the lease, and that the lease deposited was intended to be a security for the balance for the time being, not exceeding £15,000, on the account current due or owing by *J. B. Turner & Co.* to the *Banking Company*, of whatever partners or shareholders the same should from time to time consist. And there was a proviso that the signing of the agreement by *Berry* should in no way be held to bind or affect him, his heirs, executors, or administrators, or his estate and effects, in any other way, or to any other extent, than that he concurred in the deposit of the lease for securing the balance of the banking account of *Turner*, not exceeding the sum of £15,000, and it was stipulated that, in the event of a mortgage being required, *Berry* should only be a party thereto for the purpose of assigning his interest in the premises included in the lease as surety for the aforesaid balance, not exceeding the sum aforesaid, and that he should not be required to enter into any covenant, nor should be otherwise liable for the payment thereof.

The capital of *Turner* became reduced by the sum of £4000, and on the 5th of February, 1878, a new agreement was entered into between *Berry* and *Turner*, by which it was provided that *Turner* should pay *Berry* £200 in satisfaction of his claims against *Turner* for his use and occupation "of the mill, mill fixtures, machinery and premises belonging to them jointly" up to the 1st of February, 1878; that the deeds "of the joint property" deposited with the *Banking Company* as security for the banking account of *J. B. Turner* should remain so deposited without *Berry* being relieved from the guarantee thereby given, as stipulated by the agreement for dissolution of partnership, for the period of three years from the 1st of February, 1878; that "the mill, premises, and machinery belonging to the parties jointly" should be worked on joint account for the period of three years from the 1st of February, 1878, by the same being let off in room power and use of machinery; that *Turner* should continue to occupy such parts of the mill premises, and to use and work such parts of the joint machinery as he required at a rent; that during the first year of the term of three years only the rents paid by persons other than *Turner* for use of joint machinery should be divided between *Berry* and *Turner* according to their respective moieties, that the earnings or profits of the mill premises in other respects arising from rents for room and power receivable from *Turner* and from other persons, and also the rent charged to *Turner* for the use of the joint machinery worked by him, should be for the exclusive benefit of *Turner*; and that for the remaining two years of the term the mill earnings and profits, including therein the rents payable by *Turner*, should be divided between *Berry* and *Turner* in equal moieties.

*Berry* and *Turner* commenced a separate account with the *Banking Company* on the 27th of August, 1879, entitled "*J. Berry and J. B. Turner, owners of Albert Mills,*" in which account the profits of the mills were entered, and through which payments in respect thereof were made. *Turner* continued his banking account as *J. B. Turner & Co.* up to the 18th of November, 1880, when he filed a liquidation petition in the *Huddersfield County Court*. This account was then closed, and there was a large balance due upon it to the *Banking Company*. The *Banking Company* claimed

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to prove in the liquidation for the full amount of the debt, without deducting anything in respect of the value of their security under the deposit of the original lease of the mills. They contended that their security was upon partnership or joint property of *Berry* and *Turner*, and not on any separate property of *Turner*, and that consequently the rule, that a creditor holding security can prove only for the balance of his debt after deducting the value of his security, did not apply. The trustee in the liquidation rejected the proof to the extent of one moiety of the value of the security. The Judge of the County Court held that the proof must be admitted for the full amount of the debt without any deduction. The trustee appealed to the Chief Judge.

The appeal was heard on July 25, 1881.

*De Gex*, Q.C., and *Yate Lee*, for the trustee.

*Winslow*, Q.C., and *T. E. West*, for the *Banking Company*.

BACON, C.J.:—

The settled rule is that a creditor cannot come and take a share of the bankrupt's property and also retain a part of it as appropriated. I never heard that called in question. What does it signify whether it is separate property of the bankrupt or joint property of the bankrupt and another person? On the face of this memorandum of deposit two persons interested in this property, either jointly or severally, pledge it and agree to mortgage it to the bank to secure the sum of money therein mentioned. In consequence of that the bank held a security upon the property, whether joint or several. Whether *Berry* is a surety or anything else does not signify. That the bank are interested in the property nobody disputes, they having this mortgage over an entire subject made to them by the two owners of whatever degree. The question is whether, claiming to prove their debt in the bankruptcy of one of the two persons, they must realize the security which they hold on that man's property before they take a dividend from his estate with the other creditors? Can any instance be referred to in which a man has been allowed to retain his interest in the subject-matter of a mortgage, and yet to prove regardless



of the mortgage. The rule is that if you have a security you must realize it, you must get as much out of it as you can. *Ex parte English and American Bank* (1) has no kind of application to the present case. Until the bankers have realized their security against the bankrupt's property they cannot prove for the debt which they claim.

The appeal will be allowed, with costs in this Court and in the Court below.

F. G. A. W.

From this decision the *Banking Company* appealed. The appeal was heard on the 17th and 18th of November, 1881.

Sir *F. Herschell*, S.G., *Winslow*, Q.C., and *T. E. West*, for the Appellants:—

A secured creditor on proving his debt is not bound to deduct the value of any security which he holds, except a security upon property of the bankrupt against whose estate he is seeking to prove. A creditor who comes to prove against the joint estate of two partners is not bound to deduct the value of a security on separate property of one of them, and, conversely, a separate creditor is not bound to deduct the value of a security on joint estate. For this purpose the partnership is treated as a distinct entity from the partners: *Ex parte Shepherd* (2); *Ex parte English and American Bank*.

In the present case the lease of the mills must be considered as joint property. The mere fact that a partnership has been dissolved, or that a partner has retired, is not sufficient evidence of an agreement for the conversion of the joint estate of the firm into the separate estate of the continuing partner: *Lindley* on Partnership (3). In the event of bankruptcy the joint creditors would be entitled to have the property applied in paying the joint debts. And indeed each partner has a right to insist on having the partnership property applied in paying the partnership debts. After the dissolution it retains the character of partnership property, so long as any of the joint debts remain unpaid. In the present case it was clearly the intention of the parties that the lease should

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(1) Law Rep. 4 Ch. 49.

(2) 2 M. D. & D. 204.

(3) 4th Ed. vol. ii. p. 1170.

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retain its character of joint estate, for in the agreement of February, 1878, the mill, machinery, and fixtures are spoken of as "joint property," property "belonging to" *Berry* and *Turner* "jointly." Nothing afterwards happened to alter the rights of the bank, or to change the character of the property.

*Cookson*, Q.C., and *Yate Lee*, for the trustee, were not heard.

JESSEL, M.R. :—

I confess that, having listened with the greatest possible attention to the arguments of the Solicitor-General and Mr. *Winslow*, I have been unable to see anything to argue. It does not appear to me that there is any point in the case which is fairly open to reasonable discussion. That is my view, and I am bound to state it. The principles of the bankruptcy law are plain enough. A man is not allowed to prove against a bankrupt's estate and to retain a security which, if given up, would go to augment the estate against which he proves. That is the principle of the whole thing. The only question is whether, if the security were given up, it would augment the estate? Of course, if the security was given by a stranger and you were to cancel it, you would not augment the bankrupt's estate to the extent of one farthing, and consequently such a security need not be given up. Then the question arose, in consequence of the very peculiar rules of bankruptcy in this country as regards the administration of partnership estates, by which a distinction is made between the partnership as a community and each individual partner as a separate entity, viz., whether the rules which applied to a security upon the assets of strangers would apply as between the separate estate of a partner and the joint estate as it is called, that is, the estate of the partnership firm.

Now our bankruptcy law (it is peculiar, but it is well established) treats the partnership estate as an entirely separate thing from the individual partner's estate, so that you have a separate estate of each individual partner, and a joint estate or a partnership estate of the firm. The one is distributed among what are called joint creditors, that is, the partnership creditors; the other among the separate creditors of the partners.

The case soon arose where a man who had a joint debt had a security on the separate estate of a partner, and the question was whether that was within the rule which enabled a man to prove for the full amount of his debt, without giving up his security, when the property pledged was that of a stranger. It was held that it was, and for this very simple reason, that his giving up his security would not augment the joint estate. The giving up his security not augmenting the estate against which he proved, it was held that he need not give up his security.

The converse case afterwards came to be argued, and it was decided in the same way. The whole thing was discussed in *Ex parte Shepherd* which is exceedingly well reported in 1 Phil. 56 under the name of *In re Plummer*, and Lord *Lyndhurst* there stated what the principles are. He said: "Now what are the principles applicable to cases of this kind? If a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realizing his security. For the principle of the bankruptcy laws is, that all creditors are to be put on an equal footing, and, therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt; but, if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than 20s. in the pound." Then, further on, he said: "The next point is this: In administration under bankruptcy, the joint estate and separate estate are considered as distinct estates; and accordingly it has been held, that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security, on the ground that it is a different estate. That was the principle upon which *Ex parte Peacock* (1) proceeded, and that case was decided first by Sir *J. Leach* and afterwards by Lord *Eldon*, and has since been followed in *Ex parte Bowden* (2). Now this case is merely the converse of that, and the same principle applies to it."

Now, that being the principle, has it ever been extended beyond

(1) 2 Gly. & J. 27.

(2) 1 D. & Ch. 135.

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the case of joint and separate estate? So far as I am aware never, and therefore we have only to consider what possible application that doctrine has to the case before us. I will state the facts very shortly, as far as I consider it necessary to state them. *Turner* and *Berry* were partners as millowners; they dissolved partnership, and one of the terms of the dissolution was that *Turner* should take over the business and pay all the partnership debts, and indemnify *Berry*, who retired therefrom; and *Berry* assigned to him all the stock-in-trade, &c., retaining for himself half the mill, which was held on a long lease. Now let us consider for a moment what their position was on the dissolution, and we need not go back beyond that. As between *Turner* and *Berry*, *Turner* was in equity the owner of one-half of the mill and of all the partnership property, and was liable to indemnify *Berry* against the partnership debts. *Berry* was the owner of half the mill as tenant in common with *Turner* in equity, with no liability, in respect of his interest in the mill or otherwise, to the partnership debts. He remained personally liable to the creditors of the partnership, if there were any unpaid, but, as between himself and *Turner*, *Turner* had no right to call upon *Berry* to contribute one farthing to the partnership debts, nor had he any claim on the moiety of *Berry* in the mill to contribute anything to the partnership debts. That being the state of things, and *Turner* wanting money to go on with his business, he went to the bank and asked for a loan. They agreed to give him a loan if he would give them satisfactory security, and the security given was given by *Turner* and *Berry*, they being entitled in the way I have mentioned. The security was a memorandum of deposit of the lease of the mill, and it was for £15,000, and *Berry* became liable as surety for *Turner*, not personally liable, but liable *quoad* his proportion which he brought in. *Turner* pledged his half of the mill, and *Berry*, as surety for *Turner*, pledged his half of the mill to secure the £15,000, and there was an express stipulation that *Berry* was only to be a party to any mortgage for the purpose of assigning his interest in the property as surety for the balance. The result was this, that the bank got a charge on *Turner's* moiety for £15,000, and also a charge on *Berry's* moiety for £15,000 as surety for *Turner*. That is simply a separate



security. As between *Turner* and *Berry*, *Berry* had a right to call upon *Turner* to pay the £15,000; he was only a surety, and he had also a right to have *Turner's* moiety applied in satisfaction of the £15,000. But, as regards the bank, they had two mortgages, a mortgage from *Turner*, the principal, of his half, and a mortgage from *Berry*, the surety, of his half. It was a double security, so to say, but it was not in any sense a joint security.

Now, as I have already said, I listened with great attention to the argument to see if I could find out what it is which is said to make two separate securities a joint security. The argument (I hope I am not misstating it, I did my best to understand it) was this: It was said that by law, so long as the partnership debts remained unpaid, the partnership creditors could make the partners bankrupt, and that, if they made the partners bankrupt, that which was the partnership property remained joint property in the bankruptcy for the purpose of being applied to the payment of the partnership debts. Therefore, though it is not shewn that there were any partnership debts outstanding, it is said that the separate securities which the bank took are to be treated as a joint security by the partners, notwithstanding the dissolution. I do not think it necessary to comment on such an argument.

What rights the creditors may have had cannot affect the rights as between the bank and these two gentlemen. If the creditors had made them bankrupt other considerations might have arisen, but they have not. One only has become bankrupt, and we are dealing only with a proof against his estate.

Then, there being, as I have said, separate pledges by the two, this happened afterwards (it does not seem to me that anything which happened afterwards could affect the right of the bank); but what happened was this: *Turner* does not seem to have been carrying on the business very well, and a subsequent arrangement was made by which it was agreed that "the mill premises and machinery belonging to the parties jointly" (that is, they were tenants in common) were to be worked on joint account for a period of three years from the 1st of February, 1878, upon the terms therein mentioned. It is said that that arrangement made them partners in the mill. I think it did not. It was simply a special

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arrangement as to the division of the rents for the three years. It is hardly necessary to consider whether it made them partners as regards the rents; my present impression is that it did not even do that; it was only an arrangement for letting off. Two tenants in common of a mill agreed between themselves that one of them should manage the mill, and let it off floor by floor. I am not prepared to say that there might not be a partnership even in the rents for the three years, but, if there was, it made no partnership in the mill, and the arrangement, whatever it was, came to an end with the bankruptcy of *Turner*. It does not appear to me necessary to consider what would be the effect of a renewed partnership between *Berry* and *Turner*. If it were necessary to consider it, I must say I should not think it made any difference, because the dissolution of the partnership would follow on the adjudication, and then the share of the partnership property would still be a part of the bankrupt's estate. But, the facts being such as I have mentioned, it is not necessary to go into those considerations.

The result, therefore, is this, that we have a simple pledge of *Turner's* undivided moiety in the mill for the £15,000 in the terms of the contract, and *Turner* has become bankrupt. Of course, you cannot prove against *Turner's* estate, without either giving up the security which, if given up, would increase his estate by the value of it, or deducting the value. Therefore it appears to me that the Chief Judge's decision was not only right, but, as I have already said, not fairly open to discussion or to argument. For these reasons I think that the appeal must be dismissed.

BAGGALLAY, L.J. :—

It appears to me that the arguments of the Solicitor-General and Mr. *Winslow* amount to this, that under the circumstances the bank are separate creditors of *Turner* having a security on joint estate of *Berry* and *Turner*, and in this view of the case they would be entitled to prove against the separate estate of *Turner* without valuing their security on the joint property. Now, assuming the facts, or the inferences to be drawn from the facts, to be as they were said to be by the counsel for the Appellants, the case of *Ex parte Shepherd* (1) was relied upon by the Solicitor-

(1) 2 M. D. & D. 204.

General as enunciating the principles applicable to such a state of circumstances. That case is also reported under the name of *In re Plummer* in 1 *Phil.* 56, and the reports are substantially the same, though I think the principles are more concisely stated in Lord *Lyndhurst's* judgment as reported in 1 *Phil.* The principles so stated by Lord *Lyndhurst* have been referred to just now by the Master of the Rolls, and therefore I need not repeat them. But the question is, was the Solicitor-General right in applying the principles of that case to the facts of the present case in the way which he did. Do the circumstances of the present case establish that the bank are separate creditors of *Turner* with a security upon the joint estate of *Berry* and *Turner*? I think not. It appears to me to be quite sufficient merely to refer to the history of the case as it has just been stated by the Master of the Rolls, to shew that the transaction was nothing more than this: There was a security upon *Turner's* moiety of what has been called the joint property, and a collateral security on the other moiety of the same property which belonged to *Berry*. It seems to me impossible, having regard to the principles which have always been recognised as governing the interests of partners in property acquired for the purposes of their trade, and the qualities which that property assumes after the dissolution of the partnership, by whatever cause effected, to come to any other conclusion than that, at the time when the deposit was made with the bank, *Berry* and *Turner* were interested as tenants in common, and as tenants in common only, in the lease of the mill. And all the surrounding circumstances point in the same direction. I agree in the opinion that what occurred after the memorandum of deposit was executed could not alter the rights of the bank under that memorandum. Therefore, it appears to me unnecessary to consider what was the effect of the lease of the moiety of the mill by *Berry* to *Turner*, or of the sort of joint adventure in which they afterwards engaged. All those things, if they are to be taken into consideration, so far from altering the view which I take of the nature of their equities at the time when the memorandum was given, tend to strengthen it.

I think the decision of the Chief Judge was clearly right, and that the appeal ought to be dismissed.

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I am of the same opinion, and I have really nothing to add to what has been said by the Master of the Rolls.

Solicitors for Appellants: *Layton & Jaques*, agents for *R. P. Berry, Huddersfield*.

Solicitors for trustee: *Van Sandau & Cumming*, agents for *Mills & Bibby, Huddersfield*.

W. L. C.

C. A. *In re* SILKSTONE AND DODWORTH COAL AND IRON  
COMPANY.

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Nov. 16.

WHITWORTH'S CASE.

*Companies Act, 1862, s. 115—Examination by Liquidator—by Contributories—Witness—Locus Standi of, to appeal.*

204D377

The only ground on which a witness summoned to attend for examination can contest the validity of the summons is a want of jurisdiction to issue the summons or make the order. If the jurisdiction exists, a witness has no *locus standi* to appeal against the order.

The examination under the 115th section of the *Companies Act, 1862*, is as a general rule entrusted to the liquidator, but it is discretionary with the Judge whether he will entrust either the whole or any part of the examination to creditors or contributories, and whether he will or will not confine that examination within certain limits.

*Re Penysyflog Mining Company* (1) considered.

IN the winding-up of the above-named company an application had been made in Chambers by Messrs. *Holden and Kershaw*, contributories of the company, for leave to issue summonses under sect. 115 of the *Companies Act, 1862*, for the examination of such witnesses as they might be advised. On this application the official liquidator elected to take proceedings for such examination, and the Chief Clerk ordered that the applicants be at liberty to attend, at their own expense, upon the examination of any person or persons examined by or on behalf of the official liquidator, and to examine and cross-examine such witnesses.



Mr. *Whitworth*, a director of the company, was examined before a special examiner on behalf of the liquidator.

After the examination was concluded, counsel on behalf of Messrs. *Holden* and *Kershaw*, who were attending, proceeded to examine Mr. *Whitworth*.

Mr. *Whitworth*, acting on the advice of counsel, refused to answer the questions put to him. It was not alleged that the questions were not proper questions to be put.

A motion was made before Mr. Justice *Fry* for an order on him to attend the special examiner at his own expense, and answer the questions put by or on behalf of Messrs. *Holden* and *Kershaw* concerning the trade dealings, estate, and effects of the company.

Mr. Justice *Fry* made the order.

Mr. *Whitworth* appealed.

*Chadwyck Healey*, for the Appellant:—

The Appellant could not, in the face of *In re Gold Mining Company* (1), appeal against the order in Chambers directing him to attend and be examined, but he has adopted the present plan in order to raise the question whether a witness summoned can in no case come before the Court and complain of the order for examination, or whether that order of the Judge in Chambers is absolute, and if so, whether the Court or Judge can give a general roving authority to a contributory or any number of contributories to continue or repeat an examination which has been exhaustively conducted by the liquidator who represents the company, creditors, and contributories.

The liquidator is a person in an official position and under the control of the Court, and it has been held in the case of *Re Penysyflog Mining Company* (2) that the Court will not make a general order for examination under this section upon the application of contributories, they not being under such control. There is no suggestion that the liquidator is not properly discharging his duty, and indeed there was no evidence given by the contributories as to the object for which they desired this leave.

[JESSEL, M.R.:—It is not the practice to adduce evidence upon

(1) 12 Ch. D. 77.

(2) 30 L. T. (N.S.) 861.

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C. A. making the application ; the applicant does not wish the proposed  
1881 witness to know what the object is.]

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That is, no doubt, the rule in the case of an application by the liquidator, but is submitted that it cannot apply to the case of a contributory.

[JESSEL, M.R. :—Yes, the principle is the same.]

*Ingle Joyce*, for Messrs. *Holden* and *Kershaw*, was not called upon.

JESSEL, M.R. :—

It is quite plain that, independently of the case of *In re Gold Company* (1), the present Appellant has no *locus standi*. He is a mere witness summoned under the order of the Court to attend and be examined. He refuses to answer questions which he admits to be proper questions, and he is now appealing against an order of Mr. Justice *Fry* directing him to attend and answer.

The only possible ground on which this application could be based would be that the Judge had no jurisdiction to order him to attend. That objection, however, is not suggested. It is clear that there was jurisdiction. Beyond that objection the Appellant has nothing to say to the matter. It may be disagreeable to him to be obliged to attend, but the performance of the duties entailed upon us, as members of civilised communities, is not always agreeable. I think he has no right, being, as he is, a mere witness, to appeal.

But it is said that it is a vexatious proceeding that he should be examined, not only by the official liquidator, but also by contributories. As I understand the 115th section of the *Companies Act*, 1862, it gives the Judge discretion both as to the extent of the examination and as to the occasions on which it will be ordered, and also as to the persons who are to conduct it. Now, considering that the object for which the examination is ordered is discovery, it is the better and the usual course to entrust the examination to the official liquidator, who is under the control of the Court, and represents the whole company, creditors, and contributories. But there may be some cases in which he declines to interfere, or some creditor or contributory may think that he

or his agents ought not to examine in a particular case. Although there is no ground for removing the liquidator, yet the Judge may then commit either the whole or some part of the examination to some creditor or contributory. As a rule, when committing an examination to some creditor or contributory, the Judge points out the extent and limits of that examination, but it may in many cases be extremely difficult to see beforehand how far an examination should be properly carried, and therefore it is left within his discretion as to the limits he may think proper to impose in each case, and appeals from the discretion of a Judge are confined to cases where there has been a gross miscarriage. As a general rule, the Judge before whom the liquidation is proceeding knows far more about the facts of the case than the Court of Appeal can do.

The Appellant here has no *locus standi*, and the appeal must be dismissed with costs.

BAGGALLAY, L.J.:—

I am of the same opinion. It appears to me that the law of the case is correctly stated in a passage at p. 242 of Mr. *Buckley's* valuable book, with which I would express my full concurrence:—"The only matters as to which the witness can refuse to answer are matters in which he may incriminate himself, and matters involving professional confidence. If the question involves disclosure of matters with which the litigant parties have nothing to do, he may appeal to the Judge to release him from answering the question, but the decision of the Judge ought to be final and not subject to appeal." Now here I take the same view as has been expressed by the Master of the Rolls, that the parties by whom the examination is to be conducted, and the limits within which the examination is to be confined, are matters within the discretion of the Judge. It is not alleged that there is anything in this case which would incriminate the Appellant or be a breach of professional confidence, and I am therefore of opinion that he is bound to answer the questions put to him.

LUSH, L.J.:—

I am of the same opinion.

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C. A. The order of Mr. Justice *Fry* was affirmed, except that it was  
 1881 ordered that the Appellant should attend at his own expense for  
 ~~~~~ only one day.

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Solicitors: *Flux & Leadbitter*; *M. T. Burn*, agent for *Gartside & Robinson, Ashton-under-Lyne*.

M. W.

C. A.

Ex parte SADLER. In re HAWES.

1881
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 Nov 24.

*Leasehold Interest of Bankrupt—Disclaimer by Trustee—Leave of Court—  
 Appeal after Execution of Disclaimer—Bankruptcy Act, 1869 (32 & 33  
 Vict. c. 71), s. 23—Bankruptcy Rules, 1871, r. 28.*

After unconditional leave has been given by the Court to a trustee in bankruptcy to disclaim a lease of the bankrupt, and the trustee has executed a disclaimer, it is too late for the lessor to appeal from the order even for the purpose of getting conditions imposed on the trustee. The Court of Appeal has then no power to impose conditions. If the lessor desires to appeal from such an order, he ought to apply when it is made for a stay of proceedings under it.

*Ex parte Ditton* (1) followed.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 29th of July, 1881, *A. H. Hawes* was adjudicated a bankrupt. He had carried on the business of a hosier at No. 12 *Poultry*, in the City of *London*, which premises he held on lease at a rent of £1000 per annum. A trustee was appointed in the bankruptcy on the 24th of August. He had been previously appointed receiver and manager, and had as such carried on the bankrupt's business at the same premises until the 24th of August. After his appointment as trustee he continued in occupation of the premises and kept the bankrupt's stock-in-trade there until it was sold by auction on the 12th of September. On the 13th of September the trustee served notice on the lessor of his intention to apply to the Court of Bankruptcy for leave to disclaim the lease. The application was heard by the Registrar on the 23rd of September. The lessor appeared, and asked that, as a con-



dition of giving leave to disclaim, the trustee might be ordered to pay the rent of the premises since the 24th of June, 1881. The Registrar gave unconditional leave to disclaim, and on the 29th of September the trustee executed a disclaimer. After this the lessor gave notice of an appeal from the Registrar's order. No application had been made for a stay of the proceedings under the order pending an appeal.

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*De Gex*, Q.C., and *C. Lyttleton Chubb*, for the Appellant.

*E. Cooper Willis*, for the trustee, took the preliminary objection that, the disclaimer having been executed, the lease was at an end, so far as the trustee and the bankrupt's estate were concerned, and the appeal was too late: *Ex parte Ditton* (1).

*De Gex*, Q.C., and *Chubb*, for the Appellant:—

No doubt, the trustee's disclaimer is effectual without the leave of the Court; but when *Ex parte Ditton* was decided it was supposed that the disclaimer was ineffectual without leave. But rule 28 of 1871 says that the trustee shall not disclaim a lease without the leave of the Court, and though he may not be bound to ask for leave, still, if he does so, he must submit to such terms as the Court may think reasonable: *Ex parte Ladbury* (2). In *Ex parte Ditton* the contention was that a disclaimer ought not to have been allowed at all, because its effect was to destroy the security of a mortgagee, and the Court said that the disclaimer, having been once executed, could not be undone. Here the Appellant does not seek to undo the disclaimer, but only asks that certain terms should now be imposed on the trustee which he says ought to have been imposed on him by the Registrar. He does not complain of the act, but of the unconditional leave to do it.

[JESSEL, M.R.:—*Ex parte Ditton* is exactly in point. When a trustee gets leave to do an act and does it, you cannot afterwards make him a wrong-doer. You ought to have asked at the time for a stay of the proceedings to enable you to appeal.]

A right of appeal is given by the Legislature; the trustee can-

(1) 3 Ch. D. 459.

(2) 17 Ch. D. 532.

C. A. not be allowed to defeat it. Why should not this Court compel  
 1881 him now to pay the price which he ought to have paid for the  
 ~~~~~ leave to disclaim?

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JESSEL, M.R.:—

How after the decision in *Ex parte Ditton* (1) this point could be argued passes my comprehension. There the Court said it was no use considering whether the thing ought to have been done, because it had been done. The Appellant ought to have asked to have a time fixed within which the disclaimer should not be executed, so as to enable him to appeal. That is common practice. If an order giving leave to disclaim is unconditional, to impose conditions afterwards would be in effect to withdraw the leave, and the leave to do an act cannot be withdrawn after the act is done. The appeal must be dismissed.

BAGGALLAY and LUSH, L.JJ., concurred.

Solicitors for lessor: *Deane, Chubb, & Co.*

Solicitor for trustee: *W. Sturt.*

W. L. C.

C. A.

Ex parte YOUNG. *In re* YOUNG.

1881

Aug. 4, 5;
 Nov. 28.

Practice—Action against Partners in Name of Firm—Firm dissolved before Writ issued—Service on one Member of Firm—Judgment by Default—Debtor's Summons against Member not served with Writ—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 7—Rules of Court, 1875, Order IX., r. 6; Order XII., r. 12; Order XVI., r. 10; Order XLII., r. 8.

Per Lord Selborne, L.C.:—Whether the provision of Order XVI., rule 10, that partners may be sued in the name of their firm, applies, not only to a partnership existing at the time when the writ is issued, but also to a partnership dissolved before the issue of the writ in respect of a cause of action which arose during its existence, *quære*.

But, if it does, still judgment in the action is not *per se* binding on any member of the dissolved firm who has not been served with the writ as a partner, or has not admitted on the pleadings that he is or has been ad-

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judged to be a partner. Leave ought not to be given to issue execution on the judgment against such a person, if he disputes his liability, without the previous determination of the question of his liability; nor can a debtor's summons be properly issued against him on the judgment *per se*.

Per Cotton, L.J.: Order xvi., rule 10, applies only to a partnership existing at the time when the writ is issued. It does not apply to a partnership dissolved before the issue of the writ.

Per Brett, L.J.: Order xvi., rule 10, authorizes the suing in the name of their firm the members of a partnership dissolved before the issue of the writ, in respect of a cause of action which arose during the existence of the firm, and service of the writ on one of the former partners is, under rule 6 of Order ix., a good service on the others; and a judgment obtained after such a service only is binding on a former partner who has not admitted that he is nor has been adjudged to be a partner, so that a debtors's summons can properly issue on the judgment, though execution cannot issue without the leave of the Court.

A partnership consisting of several members was dissolved as to one of them on the 17th of December, and the business was thenceforth continued by the others under the old firm name, and at the old place of business. On the 18th of December a creditor of the old partnership, who was ignorant of the dissolution, commenced an action against the partners (suing them in the firm name) in respect of a debt contracted before the dissolution. On the 21st of December the writ was served personally on one of the continuing partners. The retired partner was not served in any way. No appearance was entered to the writ, and on the 29th of December the Plaintiff signed judgment by default. Execution was issued, but the sheriff found no goods of the partnership upon which to levy. No application was made under rule 8 of Order xlii. for leave to issue execution against the retired partner. In the following May, the retired partner having had no previous notice of the action, the Plaintiff served him with particulars of demand of the judgment debt, and, he not having paid it, the Plaintiff served him with a debtor's summons founded on the judgment debt. He denied the debt, and applied to the Bankruptcy Court to dismiss the summons:—

Held, by Lord Selborne, L.C., and Cotton, L.J. (*dissentiente Brett, L.J.*), that the judgment would not support the debtor's summons, and that the summons must be dismissed.

THIS was an appeal from the refusal of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy, to dismiss a debtor's summons which had been issued by *T. J. Whiting* against *F. E. Young*.

Young had carried on business in partnership with several other persons, under the firm of *Griffin, Young, Burbidge, & Young*. On the 17th of December, 1880, a notice of the dissolution of the partnership, as regarded *Young*, from the 8th of December was published in the *London Gazette*, the notice being dated the 14th

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of December. After this the business was carried on by the other partners under the old firm name, and at the same place of business. On the 18th of December a writ in an action in the Exchequer Division was issued by *Whiting* against the partners in the old firm, sued in the name of the firm, claiming from the Defendants £56 12s. 6d. for goods sold and delivered to them, and labour done for them at their request from the 23rd of October to the 8th of December, 1880. At this time *Whiting* did not know of the dissolution of the partnership. On the 21st of December the writ was personally served on one of the continuing partners at the place of business of the firm. *Young* was never served, unless under rule 6 of Order IX. this was an effectual service on him. No appearance was entered to the writ, and on the 29th of December the Plaintiff signed judgment by default against the Defendants for £56 12s. 6d. and costs. A writ of *fi. fa.* was issued on the judgment, but the sheriff found no goods of the firm on which to levy. No application was made to the Court for leave to issue execution against *Young*. In May, 1881, *Whiting* served on *Young* particulars of demand of the judgment debt. This was the first notice which *Young* had of the action. He did not comply with the demand, and on the 14th of June *Whiting* served on him a debtor's summons in respect of the judgment debt. *Young* denied his liability, and applied to the Court to dismiss the summons. The Registrar refused the application.

Young appealed.

Romer, Q.C., and *Uppjohn*, for the Appellant:—

Rule 10 of Order XVI. has no application to a partnership which has been dissolved before the writ is issued (1). Rule 6

(1) The following rules of the Rules of Court, 1875, are material to the question raised:—

Order IX., r. 6: "Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the

partnership business there; and, subject to the Rules hereinafter contained, such service shall be deemed good service upon the firm."

Order XII., r. 12: "Where partners are sued in the name of their firm, they shall appear individually in their own names. But all subsequent proceedings shall, nevertheless, continue in the name of the firm."

Order XVI., r. 10: "Any two or

of Order IX. points to a continuing partnership; it makes service of a writ on a person who, at the time of service, has the control or management of the partnership business at the principal place of business, good service on the firm. This necessarily implies a continuing business, and the fair inference is that the rule applies only to partners who are carrying on a business at the time when the writ is issued. So long as a partnership continues each partner is an agent of the partnership in respect of all matters within the scope of the partnership. This rule makes any one partner an agent of the firm for the purpose of accepting service of a writ against the firm, and, that is, because it was supposed that he would naturally communicate the fact to the other partners. But, suppose a partnership had been dissolved for months, and the partners were on unfriendly terms, it might well be that one partner who was served with a writ would not communicate with the others. Great hardship and inconvenience might result if it should be held that the rules apply to such a case. A partner, who had been indemnified by the others against the debts and liabilities of the firm might be served with a writ for an alleged debt of the firm and then allow judgment to go by default. After the dissolution of a partnership the partnership does not continue for any purpose, but each

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more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct."

Order XLII., r. 8: "Where a judgment is against partners in the name of a firm, execution may issue in manner following:

(a) Against any property of the partners as such:

(b.) Against any person who has admitted on the pleadings

that he is, or has been adjudged to be a partner:

(c.) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do; and the Court or Judge may give such leave if the liability be not disputed, or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

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partner is still an agent of the others for the purpose of getting in the partnership assets and discharging the partnership liabilities. The liability of the former partners after the dissolution is that of co-debtors or co-contractors, not that of partners, and rule 10 of Order XVI. applies only to persons who are liable as partners. The liability is to be judged of at the time when the writ is issued. The rules do not go to the same extent as mercantile usage; they do not constitute the firm a distinct *persona*: *Ex parte Blain* (1). No provision is made for default of appearance of the firm as such. Rule 8 of Order XLII. says that execution may issue "against any property of the partners as such"; that cannot be unless there is a continuing partnership.

H. F. Dickens, for the summoning creditor:—

As between himself and me the Appellant remained a partner. The only notice of dissolution was given by advertisement, no special notice was given to me. If the argument on the other side is sound, the only solvent partner in a firm might escape liability altogether by means of a dissolution, without any notice to the creditors. This would be as great a hardship as anything which is suggested on the other side. The object of the rules was to improve the remedies of a creditor. The only persons who are "liable as co-partners" are those who were co-partners at the time when the liability was contracted; a subsequent dissolution of the partnership does not make them the less "liable as co-partners." A liability incurred by persons as co-partners continues until it is satisfied; a dissolution of the partnership cannot affect a creditor's vested right of action. This view is confirmed by rule 8 of Order XLII. There is nothing in the rules to shew that they are limited to a partnership existing at the time when the writ is issued. The only question is, whether the persons sued are "liable as co-partners." A receipt for a debt due to the old firm could clearly be given now in the name of that firm. At any rate, the debtor's summons can be supported independently of the judgment. Evidence was taken before the Registrar to shew that the Appellant is liable for this debt, and, if necessary, the Court has power to allow an amendment of the summons.

(1) 12 Ch. D. 522, 533.

Uppjohn, in reply :—

An amendment was not asked for before the Registrar, and, if it is allowed now, it should only be on the terms of an action being brought in the High Court to try the liability of the Appellant, and on payment of costs. The absence of a special notice of the dissolution is immaterial. The liability of the partners in a dissolved firm depends upon estoppel. Notice must be given to determine the agency of one partner for another, but that has nothing to do with the fact of dissolution: *Rice v. Shute* (1). A debtor's summons is not execution; but can a judgment against a firm be enforced against a partner who has never been served with the writ? It can only be enforced in the way pointed out by the rules.

Aug. 5. THEIR LORDSHIPS reserved judgment, and ordered that in the meantime all proceedings on the debtor's summons should be stayed, except that the creditor might present a bankruptcy petition founded on the act of bankruptcy committed by non-compliance with the summons. But the petition was not to be prosecuted without the leave of the Court.

Nov. 28. LORD SELBORNE, L.C.:—

This is an appeal from an order made by the Registrar under sect. 7 of the *Bankruptcy Act*, 1869, on a debtor's summons, which the Appellant (the alleged debtor) applied to the Court to dismiss. The Court refused the Appellant's application. By that section it is provided that a debtor's summons may be granted, on a creditor proving to the satisfaction of the Court that a debt sufficient to support a petition in bankruptcy is due to him from the person against whom the summons is brought, and that the creditor has failed to obtain payment of his debt, after using reasonable efforts to do so. It is also, by the same section, provided that any debtor served with a debtor's summons may apply to the Court, in the prescribed manner, to dismiss such summons, on the ground that he is not indebted to the creditor serving such summons, or not indebted to such an amount as will justify such creditor in presenting a bankruptcy petition against him;

(1) 5 Burr. 2611.

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and that the Court may dismiss the summons, with or without costs, if satisfied with the allegations made by the debtor; or it may, upon such security (if any) being given as the Court may require for payment to the creditor of the debt alleged by him to be due, and the costs of establishing such debt, stay all such proceedings on the summons for such time as will be required for the trial of the question relating to such debt.

In the present case the debt alleged is stated as due upon a judgment obtained by the creditor on the 29th of December, 1880, not against the person served with the summons, but against a firm sued by the firm name. No claim is made on the footing of any antecedent or other debt independent of the judgment, and the alleged debtor (Appellant here) denies his liability on that judgment.

The material facts necessary to be stated appear to me to be these. The Appellant was a partner with certain other persons, carrying on business under the firm name by which the Defendants to the action were sued, at the time when certain work was done for that firm by the Respondent, who issued the debtor's summons. The firm (so far as relates to the Appellant) was dissolved, as between himself and his co-partners, on the 17th of December, 1880. The Appellant then ceased to carry on business, but the persons who had been his co-partners continued to carry it on under the same firm name. On the next day the Respondent (the creditor) commenced an action against the firm, not distinguishing upon the writ, or otherwise on the record, whether the old or the new firm was meant to be sued. The writ was served on the 21st of December on one or more of the persons who were at that time continuing the business under the old style. No appearance was entered, the action was undefended, and judgment passed by default against the Defendant firm on the 29th of December. The Appellant never had any opportunity of defending the action; the first notice he had of it was in the May following.

The ground on which the Appellant applied to the Court to dismiss the summons was this, that the judgment thus obtained was not binding on him, and did not create any debt on which a summons could issue under the 7th section of the *Bankruptcy Act*

The creditor (Plaintiff in the action) never took the steps which were open to him under Order XLII., rule 8, of the Supreme Court, for obtaining execution on this judgment against the Appellant, if the Appellant was in fact bound by it.

The first question raised in the argument was whether Order XVI., rule 10, of the Supreme Court, under which the action was brought, and Order IX., rule 6, and Order XII., rule 12 (as to service and appearance), which are consequential on Order XVI., rule 10, are applicable at all to a dissolved partnership? The Appellant denied this. The terms of Order XVI., rule 10, on which this question mainly depends, are as follows:

[His Lordship read this rule, and also rule 6 of Order IX., and rule 12 of Order XII., and continued:—]

It was contended for the Appellant that all these rules assume the existence at the time of action brought of a subsisting partnership, carried on under the firm named in the writ; and that, when a dissolution has taken place before writ issued, there is no such subsisting partnership as to any person not then continuing to carry on business under that firm, and that, although the Appellant in this case, and those who before the dissolution were his partners had, until the dissolution, been liable as co-partners for the debts contracted during the continuance of the partnership, they were not so (that is to say, not liable as co-partners) at the time when the action was brought.

The argument on this point did not convince me that the effect of a dissolution of partnership is to put an end to the partnership relation between the members of the dissolved firm as to their joint liabilities and assets, or as to transactions in dependence at the date of the dissolution; or that the name of the firm under which their business had been carried on may not, according to that mercantile usage of which the law does and ought to take notice, still continue to be applicable for any purposes for which the partnership relation may properly be said to continue. If this be so, the language of Order XVI., rule 10, would seem *prima facie* to be applicable to a joint partnership claim or liability by or against the members of a dissolved partnership; nor can I see, as at present advised, that the use of the present tense in this rule, or any part of the language or provisions of the other rules, would

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interpose any insuperable difficulty in the way of such a construction. This question, however, is one of large and general importance, and it would, in my opinion, be much more properly tried and determined by some competent form of proceeding in the High Court of Justice (and particularly by an application for leave to issue execution under Order XLII., rule 8) than upon a debtor's summons under sect. 7 of the *Bankruptcy Act*, 1869. Taking this view, and thinking this question open to serious doubt, it appears to me that the Registrar might have done well to stay all proceedings on the summons for such time as might be requisite for such a trial. But, if the determination of the appeal now before us had depended on those rules only to which I have already adverted, it might be going too far to say that the Registrar was not competent to decide the question, and, if he had such authority, it would be our duty now to affirm his judgment, if we thought he had decided it rightly.

The determination, however, of this appeal does not appear to me to depend upon those rules only; and, for the reasons which I am about to state, I have come to the conclusion that our present order ought to be in the Appellant's favour, and that the order of the Registrar ought to be discharged, and the summons dismissed. This debtor's summons, it is to be recollected, is founded upon the judgment of the 29th of December, 1880, only, and assumes it to be enough by itself to establish the Appellant's liability. If that assumption is erroneous, it appears to me to follow that the summons should be dismissed. But the Appellant, not having been named as a Defendant to the action, there is against him, *nominatim*, no judgment at present on record; and, as the whole proceeding under Order XVI., rule 10, is new and statutory, it appears to me that a judgment against a firm cannot be sufficient to constitute a debt capable of supporting a petition in bankruptcy against an individual person not named on the record in any other way than that which is either prescribed by or can be shewn necessarily to result from the provisions of the statute. The Rules of the Supreme Court on this subject are part of the schedule to the *Judicature Act* of 1875. The same rules have, in Order XLII., rule 8, expressly provided for this very case in a manner which appears to me to shew that judgment

against a firm is not, and ought not to be held conclusive of the liability of any person who has neither admitted on the pleadings that he is, nor has been adjudged to be a partner in the firm sued, and who has not been served as a partner with the writ of summons. [His Lordship read rule 8 of Order XLII., and continued :—] It appears to me that it would be improper, in any case of disputed liability, in which, on an application for leave to issue execution under this rule, the Court or a Judge could not properly grant such leave (without the trial and determination of the question of liability by some form of proceeding at law), to grant a debtor's summons, and afterwards refuse an application by the alleged debtor, either to dismiss it or to stay proceedings under it for such time as may be necessary for the trial of the question. If this is so, the inference I draw from it (in connection with the other rules) is that, in a case like the present, the judgment is not, *per se*, binding upon any person in the position of the Appellant so as to constitute a debt on which he can be made bankrupt, and that something more is necessary to make it so. The case appears to me to be in this respect analogous to that of a judgment against a company sued under a statute in the name of its public officer. I apprehend that, without a *scire facias*, no member of the company could be made bankrupt upon a debtor's summons under such a judgment. If the rules do apply to a dissolved partnership such a state of the law would appear to me to be very convenient and reasonable, particularly when (as in the present case) an old firm name continues to be used by a new partnership, so as to make the application of that firm name in this sense equivocal and uncertain, that it is not and cannot be ascertained by anything which appears on the record.

COTTON, L.J. :—

I agree with the Lord Chancellor that the debtor's summons in this case ought to have been dismissed, and that the appeal must, therefore, be allowed. The debtor's summons was based solely on a judgment. This judgment was obtained, not against the Appellant individually, but against a firm. The Appellant and others had originally carried on the business as partners under this firm ; but, before the action on which the judgment

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was obtained was commenced, the partnership had been dissolved by the retirement of the Appellant.

By English law, previously to the rules made under the authority of the Judicature Acts, a firm had no such existence as enabled it to sue, or made it liable to be sued. It was a mere name under which certain persons as partners carried on their business, and the individual partners as such were alone capable of suing and being sued. The Orders under the *Judicature Act*, which have the effect of an Act of Parliament, have no doubt varied the law in this respect; the question is, to what extent? In my opinion they apply only to persons who are, at the time of action commenced, partners in an existing firm, not to persons who have been partners in a firm which has been dissolved. In my opinion such persons can no longer properly be called partners. The partnership is at an end by the dissolution, and, though the persons who were members of it have authority to deal with matters in which the partnership was, at the time of its dissolution, engaged, for the purpose of winding them up, until such affairs are wound up, yet this, in my opinion, is, not because they are still partners, but because the authority of agency, which is given by the partnership contract, continues, notwithstanding the dissolution and end of the partnership, as regards matters commenced during the continuance thereof. But actions against dissolved partnerships may be brought without sufficient cause on a pretended contract which never existed. In respect of such a claim there can be no continuing agency, much less a partnership. As, therefore, the members of a dissolved firm are, in my opinion, not properly described as "partners," and "partnership" does not properly describe the relationship between them, the words "partners" and "partnership" ought not in the Orders to be held to apply to those who were formerly, but are not partners, or to a dissolved partnership, unless there is something in the Orders to shew that those words are intended to be so applied. I can find no such intention. On the contrary, I think that the provisions of Order XVI., rule 10, authorizing an application by summons for the names of the persons who are partners in the firm sued, tend to shew that the word "partners" is used in what I consider the proper sense, and the provisions of rule 6 of Order IX.,

which speak of "the principal place within the jurisdiction of the business of the partnership" and "the person having at the time of service the control of the partnership business," point to a subsisting, and not to a dissolved, partnership. I rely on these provisions, not to control what would otherwise be the meaning of the terms "partners" and "partnership," but as shewing that the Orders do not contain sufficient indication that those terms are used as including persons who have been, but are not, partners, and a partnership which formerly subsisted but has ceased so to do.

It was urged in argument that the construction of the rules at which I have arrived makes the provisions of these Orders less beneficial than a contrary construction would do. Of that I am not satisfied. It is, I think, reasonable to say that when persons are engaged in carrying on a partnership they may be sued in the firm name, and that service at the place of business, or on any one of the partners, shall be good service on all. The subsisting relations of partnership will ensure that those who have thus, in fact, notice of the action will give notice to or protect the interest of the others. But, where the partnership has been dissolved, there is no security that such will be the case. But I base my decision, not on any supposed hardship or inconvenience of a contrary decision, but on what I consider the proper interpretation of the language used in the rules.

I am of opinion, therefore, that the action on a contract alleged to have been made by the Appellant and others, as members of the dissolved partnership of *Griffin, Young, Burbidge, & Young*, could not, under the Orders, be brought against that firm as such, and that as, irrespective of the Orders, a firm is not capable of being made defendant to an action, the judgment cannot be considered as in any way binding the Appellant.

BRETT, L.J. :—

In this case an application was made to the Registrar in Bankruptcy to dismiss a debtor's summons on the ground that the debt relied on, alleged to be a judgment debt, did not exist. The facts stated were that the alleged debtor had been partner in a firm when it became indebted to the summoning creditor, but had afterwards quitted the firm, the other partners continuing to

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carry on business under the same firm name. After the alleged debtor had quitted the firm, the Respondent issued a writ against the firm, in the name of the firm, served such writ personally on one who had been a partner in the firm which existed when the debt was contracted, and was a partner in the existing firm, and, on default of appearance, signed judgment against the firm. The writ was not otherwise served; the alleged debtor did not appear to it; it was not stated that he had knowledge in fact that it had been issued. The debtor's summons was founded on a judgment debt alleged to be due by the debtor under and by reason of such judgment. It was urged on behalf of the alleged debtor that the writ could not be treated as a writ served on him; that there was, therefore, no writ served on him; that the judgment was, therefore, no judgment against him; and that there was, therefore, no judgment debt due by him as alleged in the debtor's summons. The Registrar did not accede to this argument, but held that there was a judgment debt due by the debtor, and refused to dismiss the summons. The solution of the dispute thus presented was made in the argument before us to depend solely on the construction of several of the rules under the *Judicature Act*.

The question now, however, is whether the alleged debtor is a person bound by the judgment so as to be a judgment debtor, or whether for any reason the summons should have been dismissed. First, is he a person who, if personally served with the writ, could be sued by a writ issued against a firm in the firm name? That depends upon whether rule 10 of Order XVI. can apply to a firm which existed at the time of the debt being contracted, but which had ceased to exist at the time of the writ being issued. The essential words, as applicable to the case under discussion, are: "Any two or more persons liable as co-partners may be sued in the name of their firm." The only persons liable as co-partners are those who were so when the debt was contracted. The only firm which can be sued with effect is the firm which existed when the debt was contracted. The rule must, therefore, as it seems to me, apply to that firm and to the then members of it, the only persons liable as co-partners. The firm name, therefore, in which persons "liable as co-partners" may be sued is the name of the

firm which existed when the debt was contracted. But that firm, it is said, had ceased to exist when the writ was issued, and therefore cannot be sued. The rule, however, is not that a "partnership" or that "a firm" may be sued, but that persons liable as co-partners may be sued, and therefore, as it seems to me, a partnership, though dissolved, is by the rule considered still to exist for the purpose of suing or being sued in respect of transactions which occurred whilst it was in full force. It follows, I think, that the firm name mentioned in this rule is the name of the firm which existed when the debt was contracted, and that the firm so named exists for the purpose of being sued at the time of the issuing of a writ in respect of a debt contracted whilst the firm was in full force, though the firm for other purposes has ceased to exist. The rule therefore applies, and the alleged debtor in the present case could, if the writ was duly served on him, be made liable to judgment by virtue of a writ issued against the firm in the name which it had when the debt was contracted.

The second question, then, is whether such a writ, served in the way in which this writ was served, can be deemed to have been served on the alleged debtor. By rule 6 of Order ix., "where partners are sued in the name of their firm the writ shall be served (amongst other modes) upon any one or more of the partners, and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm." The phrase, "where partners are sued in the name of their firm," must, by the same course of reasoning as was applied to the rule just now discussed, refer to the firm which existed when the debt was contracted. The writ, therefore, may be served upon any one of the partners of that firm. I cannot think that, because some of the other modes of service can only apply to a service on a firm existing at the time of the service, this mode of service must also be held to be exclusively applicable to a firm existing at that time. When so served, "such service shall be deemed good service upon the firm." "Upon the firm" here can only mean upon the partners of the firm. If "firm," therefore, in the first part of the rule means the firm which existed at the time when the debt was contracted, then "firm" in the second part of the

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rule means the partners of the firm which existed when the debt was contracted. If this be a true view of these rules, and it seems to be a true view, unless some other rule forces one to conclude that it is a wrong view, the alleged debtor in the present case is to be deemed to have been served with a writ which might properly be issued against him. If he has been legally served, and has made default in appearing, the judgment by default binds him by the common law as a judgment against him. It is argued, however, that rule 8 of Order XLII. shews that the judgment is not in any way effective against the alleged debtor. By that rule, "where a judgment is against partners in the name of a firm, execution may issue in manner following against any person who has been served, as a partner, with the writ of summons, and has failed to appear." If the rule had ended there, it would have seemed that, by virtue of the rules above discussed, the alleged debtor would have been in terms within this rule. And, if execution could issue against him, it could hardly have been argued that he was not a judgment debtor. But the rule continues thus: "If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do," &c. It is urged that this part of the rule has no application, unless the part is confined to the case of a partner personally served. I think that is so. It follows that execution could not issue against the alleged debtor in the present case, without leave. But it does not seem to me to follow from that that the judgment is not a valid judgment against the alleged debtor, or that, because "execution" cannot issue against him without leave, other remedies on a valid judgment may not be put in force against him. This rule as to execution is not inconsistent with what seems to me to be the true construction of the other rules. I see no reason, therefore, to be derived from the rules and Orders why the judgment creditor may not properly issue a debtor's summons. I see no hardship or injustice, I confess, in such a construction, and, as to the application of sect. 7 of the *Bankruptcy Act*, I see no hardship in dealing with the debtor's summons in such a case in the ordinary way. If the answer to the debtor's summons is that the alleged debtor was not,

at the time of the original debt being incurred, a partner, that would be a proper matter for inquiry before the Registrar; because if he was not then a partner the writ is not a writ against him; the service is not a service upon him; the judgment cannot be a judgment against him. But, if he was then a partner, the judgment is binding upon him as a judgment, and he cannot say that there was no debt. And this, it is said, does raise a great hardship and injustice. But there is the same hardship in the case of a partnership existing at the time of the issuing of the writ. The answer seems to me to be, that those who drew the rules allowing service upon a firm relied upon its being always the interest of one person who is served to inform others who are jointly liable with him, if he is liable. A person who leaves a firm knowing of existing liabilities, or of possible claims, runs the risk. As to Order XLII., it was thought safer to bridle the power of "execution," a drastic remedy put in force at the will of the judgment creditor, and irreparably mischievous if wrongly issued; but there seems to me to be no substantial ground for otherwise interfering with the natural operation of the rule as to service. I, therefore, am of opinion that the decision of the Registrar was correct, and should be affirmed.

Solicitor for Appellant: *W. Moon.*

Solicitors for Respondent: *Keene, Marsland, & Bryden.*

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Liquidation by Arrangement—Close of Liquidation—Discharge of Debtor—Sale of Estate to Trustee—Right to after-acquired Property—Costs—Appeal for Costs—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 20, 28, 125.

The creditors of a liquidating debtor in 1877 passed a special resolution authorizing the sale of his estate to the trustee at such a price as would pay a dividend of 5s. in the pound to the creditors, and also the costs of the liquidation. The resolution was sanctioned by the Court, and was carried out by the trustee. The debtor was not a party to the arrangement, and did not know of it for some time afterwards. The creditors did not pass any formal resolution fixing the close of the liquidation, or granting the debtor a discharge, but he commenced another business. In 1881 this came to the knowledge of the trustee, and he thereupon took possession of the debtor's stock-in-trade, claiming it on behalf of the creditors under the liquidation:—

Held, that the resolution did not amount in substance to a close of the liquidation or a discharge of the debtor, and that consequently the trustee was entitled to the debtor's after-acquired property for the benefit of the creditors.

But *held*, that, under the circumstances, the costs might properly be the subject of appeal, and that the debtor's costs must be paid out of the estate, and (reversing the decision of *Bacon*, C.J.), that the trustee's costs must also be allowed out of the estate.

Ex parte Tinker (1) distinguished.

ON the 20th of March, 1876, *C. J. Wainwright*, at that time an hotel-keeper carrying on his business at the *Queen's Hotel, South Shields*, filed a liquidation petition in the *Newcastle County Court*. At the first meeting of the creditors on the 7th of April it was resolved to accept a composition of 10s. in the pound, to be secured to the satisfaction of certain of the creditors. The debtor was unable to obtain any security, and at the second meeting of the creditors a liquidation by arrangement was resolved upon; a committee of inspection was nominated, and *Joseph Greener* was appointed trustee. The debtor's estate then consisted of the *Queen's Hotel*, which was subject to mortgages to the extent of £2650, with the stock-in-trade and some household furniture. Attempts were made to sell the hotel by private contract and afterwards by public auction, but without success, and, in order to

(1) *Law Rep.* 9 Ch. 716.

prevent the mortgagees from exercising their powers of sale, the trustee was compelled to advance them out of his own moneys £435. The trustee himself then made an offer to the committee of inspection to purchase the debtor's estate for such a price as would, after paying off the mortgages, leave sufficient to pay the creditors a dividend of 5s. in the pound and the costs of the liquidation. The committee thought that this offer should be accepted, and accordingly a meeting of the creditors was summoned by the trustee, to be held on the 9th of July, 1877, to consider the offer. The notice summoning the meeting stated that it was to be held "in accordance with a resolution of the committee of inspection . . . for the purpose of considering a proposal to sell the estate of the debtor for such a sum as will pay to the creditors a dividend of 5s. in the pound upon the amounts of their respective debts, together with the costs, charges, and expenses of the liquidation." The notice did not state that the proposal came from the trustee. In pursuance of this notice the creditors met on the 9th of July, and unanimously passed a special resolution authorizing the trustee "to sell the estate of the debtor for such a sum as will pay the creditors a dividend of 5s. in the pound upon their respective debts, together with the costs, charges, and expenses of the liquidation, such dividend to be payable within one month from the confirmation of the resolution by the Court." On the 10th of August, 1877, the Judge sanctioned the resolution by signing the following memorandum at the foot of it: "I approve of this scheme of settlement." The trustee was afterwards advised by counsel that the proceedings were informal, on the ground that the meeting at which the resolution was passed ought to have been called by the committee of inspection and not by the trustee. Accordingly a fresh meeting of the creditors was summoned for the 23rd of November, 1877, by a notice, signed by the members of the committee of inspection, which stated that the meeting was "for the purpose of authorizing the sale of the estate of the debtor to *Joseph Greener*, the trustee of the estate, upon the terms of a resolution of the creditors of the debtor at a meeting held on the 9th of July last, the said resolution being as follows:" The resolution of the 9th of July was then stated. The meeting was held on the 23rd of November, and was adjourned to the 30th of

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November, and at the adjourned meeting the creditors unanimously passed the following resolution: "Resolved, that, the trustee not having been able to sell the debtor's estate at the sum required by the special resolution of the 9th of July last, but being himself willing to purchase the estate (which consists, among other assets, of the *Queen's Hotel* and premises, *South Shields*, and certain tenements adjoining) at such a price as will, after paying the principal and interest on the mortgages, leave sufficient to pay the creditors a dividend of 5s. in the pound, and all the costs, charges, and expenses of the liquidation, the trustee be allowed to purchase the said estate for such a sum as will pay the existing mortgages upon the said properties, and also the said dividend and costs, and upon payment of the amount of the said mortgages and the said dividend of 5s. in the pound, the mortgagees shall convey the hotel and other purchased property to the trustee for his own individual benefit in fee simple." On the 7th of December, 1877, the Judge sanctioned this resolution by signing the following memorandum upon it: "I approve this scheme."

The debtor was in no way a party to any of these proceedings, and was, in fact, ignorant of them for some time afterwards. No formal resolution was passed by the creditors granting him a discharge or fixing any time for the close of the liquidation.

After the confirmation of the resolution by the Court *Greener* paid off the mortgages, paid the dividend of 5s. in the pound to the creditors, and paid the costs, &c., of the liquidation. No further step was taken in the liquidation until September, 1881. The debtor had meanwhile started in business as a clothier and outfitter in *South Shields*. On the 7th of September, 1881, the trustee saw an advertisement in a *Shields* newspaper from which it appeared that the debtor was then carrying on the business of an outfitter in *South Shields*, and that he had recently purchased the stock of a bankrupt for £995 5s. In consequence of this the trustee made inquiries, and on the 28th of September he took possession of the debtor's stock-in-trade at his place of business, claiming it as part of the estate divisible among the creditors under the liquidation. *Wainwright* applied to the County Court on the 30th of September, and obtained *ex parte* an interim order restraining *Greener* from disposing of the goods which he had

seized until after the 21st of October, and on the 4th of October another order that *Greener* should return to *Wainwright's* premises some of the goods which he had removed. *Greener* applied to the Court to rescind these orders, and *Wainwright* made a counter-application. On the 1st of November, 1881, the Judge dismissed *Greener's* motion with costs, and upon *Wainwright's* motion he made an order that "by virtue of the terms of a scheme of settlement of the affairs of *Wainwright*, approved of by this Court on the 11th of August and the 7th of December, 1877, and by reason of the acts done and interests acquired by *Greener* under the scheme of settlement *Greener* ceased to be trustee of the estate and effects of *Wainwright* and ceased to be trustee in the liquidation, except for purely formal purposes." And it was ordered that *Greener* should withdraw from possession of the goods which he had seized, and that he should be absolutely restrained from taking possession of or in any way interfering with any property which *Wainwright* had acquired since the date of the scheme of settlement or which he might thereafter acquire, and that *Greener* should pay *Wainwright's* costs.

Greener appealed to the Chief Judge. The appeal was heard on the 14th of November, 1881.

Winslow, Q.C., *Creed*, and *J. E. Joel*, in support of the appeal:—

The resolutions passed by the creditors in the debtor's absence authorizing *Greener* to purchase a portion of the debtor's property, though sanctioned by the County Court Judge, did not operate as a discharge of the debtor or of his future estate under sect. 28 or sect. 125, sub-sect. 9; and so long as he is undischarged all property which he acquires after the commencement of the liquidation belongs to the creditors under that liquidation: *Ex parte Ford* (1). There is no evidence that the trustee or the creditors had notice of the subsequent trading, or acquiesced in it so as to bring the case within *Troughton v. Gitley* (2); *Tucker v. Hernaman* (3). The debtor was not a party to the arrangement, as was the case in *Ex parte Tinker* (4); *Ex parte Russell* (5), (on which cases the

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(1) 1 Ch. D. 521.

(2) Amb. 630.

(3) 4 D. M. & G. 395.

(4) Law Rep. 9 Ch. 716.

(5) Law Rep. 10 Ch. 255.

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C. A. County Court Judge relied), but did not even know of the sale to
 1881 Greener, and cannot afterwards claim to take advantage of the
Ex parte arrangement.

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Robinson, Q.C., and Strachan, for Wainwright :—

After completing the arrangement and realizing the property for the benefit of the creditors, the liquidation ceased, and it was the duty of the trustee to have reported the matter to the Court under sect. 47. We say that the special resolutions of November, 1877, which provided for the sale of the whole, and not a part only, of the debtor's estate, and for payment out of the proceeds, not only of 5s. in the pound, but also of all the costs and expenses of the liquidation, and were approved of by the County Court Judge as a general scheme of settlement of the debtor's affairs under sect. 28, were intended as final, and operated as a close of the liquidation, so as to discharge the debtor. Even though he has not obtained an order of discharge, any property falling in to a bankrupt after the bankruptcy has been closed belongs to him, and not to the trustee: *In re Pettit's Estate* (1); and after passing the resolution of December, 1877, the trustee and the creditors were estopped, and will not be allowed to seize his after-acquired property: *Ex parte Tinker* (2). Moreover, in this case *Wainwright* was expressly told by the trustee that it was necessary for him to have an order of discharge, and relying on this statement and that he was entirely clear from his old liabilities, he embarked in a fresh business as a free man.

[They also referred to *Ex parte Turquand* (3).]

Finlay Knight, for subsequent creditors, was not heard.

Winslow, in reply, referred to *Ex parte Jarvis* (4).

BACON, C.J. :—

The question before me is one merely of law, and must be decided according to law. The law of bankruptcy, of course, is plain. The bankrupt's estate until he is discharged is the pro-

(1) 1 Ch. D. 478.

(2) Law Rep. 9 Ch. 716.

(3) 3 Ch. D. 445.

(4) 10 Ch. D. 179.

perty of his creditors, liable to the payment of the debts. There are various ways in which his discharge may be obtained in bankruptcy, and, as is clearly pointed out, in liquidation also. The *Bankruptcy Act*, 1869, s. 125, sub-s. 9, has been referred to, and sub-s. 7 may be considered on the subject. [His Lordship read, sect. 125, sub-ss. 7 and 9]. Without compliance with those enactments there can be no discharge of a bankrupt in liquidation. Then with certain exceptions the whole of the provisions of the *Bankruptcy Act* being applicable to the case of liquidation by arrangement, one of those provisions is sect. 28, on which the learned County Court Judge's judgment is founded. [His Lordship read this section.] Now what takes place in this case? A part of the bankrupt's estate, and only a part of it, consists of a certain mortgaged property, a public-house or tavern, and something else. It was necessary for the benefit of the creditors that that should be realized, and attempts were made to realize it. First the bankrupt himself made an offer to buy it. That fell through; and then the trustee put it up for sale by auction. There was, however, no sufficient bidder. Then it is proposed that the trustee shall himself become the purchaser, and a meeting is held at which resolutions are passed of which the Court approves. When the matter went afterwards before some conveyancer he pointed out the impropriety of the trustee becoming the purchaser, and the defect was afterwards attempted to be cured by another meeting being held in which the name of the trustee as the intended purchaser was mentioned, and a resolution was passed approving of that mode of dealing with it, and the property being bought by him he became the purchaser thereof. All this was done without any communication with the bankrupt. The composition, as mentioned in sect. 28, never was offered by the bankrupt. The arrangement and settlement of the bankrupt's affairs never took place. Nothing took place but the realization of one particular asset, one mortgaged estate sold for a price specified; and if there was any more passed by that word "estate," then it passed by the direction and order of the creditors, and belongs to Mr. *Greener* (the trustee) as a thing he purchased under the arrangement. What benefit did the bankrupt derive from this? What right or authority had the bankrupt to interfere with the

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C. A. creditors, or the trustee, or the committee of inspection in the
1881 realization of the estate in any way they thought fit? He had
Ex parte no such right, and has asserted no such right. He was not present
WAINWRIGHT. at, nor a party to the scheme, if scheme it is to be called, by
In re which the trustee and the inspectors agreed that for a price then
WAINWRIGHT. named—or if not exactly named, consisting of certain elements
C. J. B. which were then named—they would transfer the property in
the mortgaged estate, and perhaps in some other estate, but
certainly not the after-acquired estate. If Mr. *Greener* makes
any claim for that, he will have to settle that with the creditors
when the question arises, but here the simple question before
me is whether the statute having vested all the after-acquired
property of a bankrupt in his trustee in bankruptcy, the sale
of a part of his estate is to imply and carry with it a dis-
charge from all his debts. I cannot follow that reasoning, and I
cannot see any reason why it should be so. If there had been
any agreement between the bankrupt and his creditors—if there
had ever been any offer of composition or arrangement with his
creditors, something might be said about it, but here the bank-
rupt is a total stranger, as I must consider, to the transaction
which the trustee has entered into, and in pursuance of those
resolutions now lays claim to his after-acquired property. I can
see no ground on which the case can be sustained. No doubt it
is a hard case, if the bankrupt thought he had got a release when
his mortgaged estate was sold. If he anticipated that, it is very
unfortunate that he should be disappointed. Suppose he had
opposed it, what right had he to oppose it, or to engraft upon a
contract of sale and purchase between the trustee and the cre-
ditors a bargain that he should have his discharge? There is no
reason to believe that if he had opposed it, the opposition would
have been acceded to. But without inquiring into that, all I have
to do is to deal with the law as expressed in the statute. After-
acquired property of an undischarged bankrupt belongs to his
creditors. Has anything been done to affect that enactment?
The only attempt which is made to bring it within the statute is
to say that it comes under sect. 28, and that it was a scheme that
was approved by the Court; and therefore to that extent the
Act of Parliament must have been disregarded. I do not feel

myself at liberty to do so. I think the transaction by which the trustee, with no more than appears here, became the purchaser of this estate was wrong. I would not be understood to give the slightest degree of encouragement, either by a distinct expression of opinion, or by inference from anything I say, to the notion that a trustee in bankruptcy can by law become the purchaser of any part of the bankrupt's estate. If he is minded to become the purchaser of the estate, all he has to do is to ask to be discharged from his office of trustee, and when discharged he may be competent to become a purchaser. That has not taken place in this case. I have nothing to do with it now, except for the purpose of illustrating the case before me; but I have to do with it to this extent, that if the proper proceedings had been adopted—if Mr. *Greener* had applied to be discharged from his office of trustee, and then, being free from all the duties and obligations of a trustee, he had proposed to become the purchaser on the terms mentioned, he would have had a perfect right to do so, and in my opinion his right to do so could not have been gainsaid. It was his neglect of that reasonable and proper course which has given rise to this litigation, and although, therefore, I regret I cannot adopt the order which the learned Judge below has made, I cannot, on the other hand, make the costs of this appeal fall on the bankrupt, in whose favour the learned Judge's decision was. I must, therefore, discharge the order that has been made, but I must do so without directing the payment to the trustee of any costs either of the appeal or any of the other costs of the litigation. He has succeeded, but I give him no costs of this litigation—for the reason I have given, viz., that he has caused the litigation.

F. G. A. W.

From this decision the debtor appealed. The trustee gave notice that on the hearing of the appeal he should contend that the decision of the Chief Judge should be varied so far as it ordered him personally to bear his own costs.

The appeal was heard on the 1st of December, 1881.

Robinson, Q.C., and Strachan, for the Appellant:—

The resolution to sell the debtor's estate amounted to a close

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C. A. of the liquidation under the powers given to the creditors by
 1881 sect. 125, sub-sect. 9 of the *Bankruptcy Act*, 1869. It is not
Ex parte necessary that the words "close of the liquidation" should be
 WAINWRIGHT. actually used, if that which is done amounts in substance to the
In re same thing. The resolutions authorized a sale of the debtor's
 WAINWRIGHT. "estate"; that is a most comprehensive word.

[JESSEL, M.R., referred to *Elbbs v. Boulnois* (1), which overruled the decision of Vice-Chancellor Bacon in *In re Bennett's Trusts* (2).]

If the liquidation was not closed, then, under sect. 20, it was the duty of the trustee to call a meeting of the committee of inspection once every three months. He has not done this.

[JESSEL, M.R.:—This case is not like *Ex parte Tinker* (3). The *ratio decidendi* of that case was afterwards explained by Lord Justice Mellish in *Ex parte Russell* (4).]

After the close of a bankruptcy or liquidation property acquired by the bankrupt or debtor belongs to him, not to the trustee, even though the bankrupt or debtor has not obtained an order of discharge: *In re Pettit's Estate* (5). The only remedies of the creditors are then under sect. 54 of the Act. The resolutions amounted to a "scheme of settlement" of the debtor's affairs under sect. 28, and that must mean a complete settlement. The fact that the Judge signed the resolutions shews that the proceedings were under sect. 28. Regard must be had to the terms of sect. 47. As much of the property of the debtor was realized as could be realized "without needlessly protracting" the liquidation, and that being so, if this had been a bankruptcy, the Court must, under sect. 47, have made an order closing the bankruptcy. In that case, under sect. 54, the creditors could have had no remedy against the property of the bankrupt for three years, and after that they could, if the bankrupt had not obtained a discharge, have enforced their claims against his property, but not without the leave of the Court. It was not intended that a liquidating debtor should be worse off than a bankrupt. It would be

(1) Law Rep. 10 Ch. 479.

(2) Ibid. 19 Eq. 245.

(3) Law Rep. 9 Ch. 716.

(4) Ibid. 10 Ch. 255, 261.

(5) 1 Ch. D. 478.

a great hardship on the Appellant if after the lapse of time he should not be allowed to keep what he has acquired by his industry.

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Winslow, Q.C., *Creed*, and *J. E. Joel*, for the trustee, were not heard on the appeal.

On the trustee's notice, they contended that there was no reason for depriving him of costs. He bought the property under the authority of the resolutions of the creditors, and with the sanction of the Judge, and there had been nothing improper in his conduct. He ought to be allowed his costs out of the debtor's estate.

JESSEL, M.R.:—

I think this is an extremely hard case. I think the Appellant might fairly consider, after what had taken place, that he was entitled to trade for his own benefit. But, however hard the case may be, I feel myself bound to say that the terms of the 125th section were not complied with. If there had been no discussion and no authority on the subject, the case would have been very plain to my mind. The 125th section applies to liquidation petitions, and it provides that a debtor, who thinks that he can induce his creditors to be more lenient to him in a liquidation than in a bankruptcy, may summon a meeting of his creditors, the theory being, no doubt, that he will be more successful in getting a favourable decision of the creditors in a liquidation than in a bankruptcy. He is to summon a meeting of his creditors, and they may by a special resolution "declare that the debtor's affairs are to be liquidated by arrangement, and not in bankruptcy," and then sub-sect. 5 provides that "All such property of the debtor as would, if he were made bankrupt, be divisible among his creditors, shall, from and after the date of the appointment of a trustee, vest in such trustee under a liquidation by arrangement, and be divisible amongst the creditors." In a bankruptcy, not only the property of the bankrupt at the date and from the date of the commencement of the bankruptcy vests in the trustee, but all his future acquirements, and were there no such provisions as are contained in sects. 47 and 48 as to the close of the bankruptcy and the discharge of the bankrupt, he never would be free.

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After the close of the bankruptcy, the bankrupt, if he has not got a discharge, is not free until he has paid 10s. in the pound, but he is free for three years, and after that three years his creditors may apply to the Court for payment out of his property. If, however, he is discharged, he is free altogether as to his future property. There are no such provisions for liquidating debtors. On the contrary, the 9th sub-section of sect. 125 says, "The provisions of this Act with respect to the close of the bankruptcy, discharge of a bankrupt, to the release of the trustee," and so on, "shall not apply in the case of a debtor whose affairs are under liquidation by arrangement." If it had stopped there, the debtor could never have got rid of his liabilities at any time; his future acquired property would always have remained for his creditors. But it goes on, "the close of the liquidation may be fixed, and the discharge of the debtor and the release of the trustee may be granted by a special resolution of the creditors in general meeting." The closing of the liquidation and the discharge of the debtor are made to depend entirely on the resolution of the creditors. A liquidating debtor may be worse off than a bankrupt. He may think that his creditors will be more friendly, and they may turn out to be more hostile, but that is not generally the case. Everybody knows that under a liquidation the creditors are, as a rule, more favourable to the debtor than in a bankruptcy, and the Act contemplated that he would get the proceedings closed or a discharge more easily under the 9th sub-section than in a bankruptcy, and experience has shewn that that is so. The debtor must then apply either for a close of the liquidation proceedings or for his discharge. This unlucky debtor, through some mistake or other, did not apply for either. What occurred was this: His whole estate, that is, what was substantially the whole, the hotel, was put up for sale. It was not sold, and then the trustee came forward and said, "I am willing to take over all the debtor's estate, and to pay the creditors 5s. in the pound and the costs of the liquidation." The creditors accepted this offer, and he took all the debtor's property. The arrangement was approved of by a special resolution, which was duly confirmed by the County Court Judge. That, of course, put an end to all the debtor's estate, wound up the estate, and, if the proceedings had been in a

bankruptcy, it would have been the duty of the trustee to apply for an order to close the bankruptcy. It was not a bankruptcy, and the debtor did not apply to the creditors to pass a resolution to that effect. But there can be no doubt that he thought, and that everybody thought, that there was an end of the liquidation. The very nature of the transaction shews that. The estate was sold, and the costs were paid; the solicitors were not going on without having a fund for costs. No doubt, in fact and in substance, everybody thought there was an end of the matter. But, when we look at the resolution, it does not say anything about closing the liquidation. It was argued that, although there is no resolution expressly closing the liquidation, yet, if in substance the resolution does close it, that will do. I assent to that. It is a question of substance and not of words. But in this resolution there is not a single thing about closing the proceedings. It is a sale of the estate to the trustee on special terms; he is to pay the expenses and 5s. in the pound to the creditors, and that was the reason for going to the Court. I do not think it is a scheme within the 28th section, though it required the sanction of the Court under the 20th section, because there could not be a sale to the trustee without that sanction. Therefore he got the sanction of the Court. But I cannot see that a general scheme for the settlement of the debtor's affairs—a sale of the estate and the payment of a dividend necessarily closes the proceedings. The only peculiarity here is, that, instead of selling for a fixed sum, the sale is for a sum which shall be sufficient to pay a dividend of 5s. in the pound. However that may be, I cannot find anything in the *Bankruptcy Act* which says that upon such a scheme of settlement the matter is closed. It is quite plain that after such a scheme, there must be an order to close the proceedings. Therefore, that will not do. But I prefer to rest my decision on the plain and literal meaning of the 9th sub-section. You must find in the resolution of the creditors something amounting in substance to a closing of the proceedings, and that I cannot find here. That being so, I have reluctantly (for I think the debtor has been very hardly dealt with) been compelled to arrive at the conclusion that the trustee was entitled to seize his after-acquired

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C. A. property as he has done, and, therefore, that the decision of the Chief Judge, reversing the decision of the County Court Judge, is correct.

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But, although I cannot have regard to this hardship in relation to the law of the case, I can and will do so as regards the costs. Let us see what has happened. This man has been allowed to carry on trade for three or four years, to obtain a business, and also to incur new debts, and then this trustee comes down upon him suddenly and takes away his property without any warning or notice of any kind that he was carrying on trade for the benefit of his creditors. Taking advantage, as it appears to me, of the literal wording of the resolution and not of its spirit, if I may say so, the trustee ruins this man, and probably deprives him and his new creditors of what they ought to have. In that position of matters this man employs a solicitor to defend him. Is not that solicitor to be paid? Is it not a case in which a solicitor should be allowed to defend him, and should not go without payment for so doing? Having an estate to be administered, ought we not to make provision for the payment of the solicitor who has taken the opinion of the Courts? In the County Court the decision was in his favour; before the Chief Judge it was not; and we cannot blame him for applying to the Appeal Court to ascertain whether the County Court Judge or the Chief Judge had arrived at the right conclusion. I think it is a proper case for allowing the debtor's costs to come out of the estate which has to be administered. The next point we have to consider is this. The trustee has been deprived by the Chief Judge of his costs, on a ground which, it appears to me, was not sufficient,—on the ground that the trustee ought not to have bought the estate of the debtor. But he bought it openly and fairly enough, explaining to the creditors that he was about to buy it. In fact there was a second resolution passed by the creditors, the first not being sufficient, and then he took the proper steps to obtain the sanction of the County Court Judge to the arrangement. There was no harm in that. Can it be suggested that the trustee did anything wrong or improper? I can simply say I do not follow it. It appears to me that the trustee was entitled to his costs, and I think it is a case where he should also have his costs of the appeal.

In Courts of Equity trustees are generally allowed their costs out of the trust fund. This is a Court of Equity, and it is the practice in the administration of bankruptcy that, if the trustee does nothing wrong, he should have his costs. It seems to me a case in which the trustee was entitled to appeal for costs. We dismiss the appeal, but we give both parties their costs all through, both here and in the Courts below, out of the estate. If the estate should not prove sufficient, the trustee's costs, of course, are entitled to priority.

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BAGGALLAY, L.J.:—

I agree with what has been said by the Master of the Rolls, and I share in the regret expressed by him that we should feel compelled so to decide. Some cases have been referred to in the course of the argument, on which I desire to say a few words. *In re Bennett's Trusts* (1) and *Ebbs v. Boulnois* (2) were both cases of liquidation by arrangement. In both of them the debtor had obtained a discharge, and in neither of them had there been any resolution for closing the liquidation, and it was held by the Court of Appeal in each case that the property acquired by the debtor after the date of the order of discharge belonged to himself and not to the trustee. But neither of those cases can be any authority for the present case, because here neither was a discharge granted, nor was there a resolution for closing the liquidation. *Ex parte Tinker* (3) at first sight appeared more in point. That again was a case of liquidation by arrangement, and there had been a resolution selling the whole of the estate to the debtor, though there had been neither an order of discharge nor a resolution closing the liquidation. Indeed the creditors had refused to grant the debtor his discharge. But the Court held that the after-acquired property belonged to the debtor and not to the trustee. The reason of that decision is concisely expressed by Lord Justice Mellish in his judgment in the later case of *Ex parte Russell*, where he said (4), "In the case of *Ex parte Tinker* we held, that, although the creditors had passed no formal resolution either for the discharge of the debtor or for the close of the liquidation,

(1) Law Rep. 19 Eq. 245.

(2) Ibid. 10 Ch. 479.

(3) Law Rep. 9 Ch. 716.

(4) Ibid. 10 Ch. 261.

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nevertheless, if they had so dealt with the debtor by selling his assets to him, that it would be plainly contrary to good faith as between them and the debtor that they should claim his future acquired property, the future acquired estate was freed from the former debts." Therefore, the real ground of the decision in *Ex parte Tinker* (1) was this, that, considering the contract between the debtor and the trustee as representing the creditors, to sell everything to the debtor himself, it would have been a breach of good faith, as between them, to treat the after-acquired property as still remaining vested in the trustee. But what suggestion can there be here of any breach of good faith? The debtor was in no way privy to the sale till after the arrangement had been made. The sanction given by the County Court Judge to the sale in a particular way of a portion of the debtor's property—of all the debtor's property as it then appeared—still, as it seems to me, left vested in the trustee the right to his after-acquired property. It would be impossible, I think, to get over the words of the Act, though, as I have said, I very much regret to be obliged so to hold, because I have very little doubt that the creditors who assented to that arrangement imagined that there was an end of the matter.

LUSH, L.J.:—

We are not at liberty in deciding the legal rights of the parties to take into account the hardship on either party. If we were, I do not think there could be two opinions about this being a hard case. But that is a matter which we must leave out of consideration in deciding the case. The question is whether, there having been no formal closing of the liquidation, and no formal discharge of the debtor, the transaction, recognised by the resolution, and realized in the sale of the assets of the debtor to the trustee, amounted in substance to a renunciation by the creditors of the debtor's after-acquired property? I am clearly of opinion that it did not. In the case of a sale of the estate to the debtor himself for a price, as in *Ex parte Tinker*, where the debtor agreed to pay by yearly instalments a certain sum which must have come out of his yearly earnings, the Court held that it would be a breach of

(1) Law Rep. 9 Ch. 716.

faith to take his after-acquired property, because all parties must have understood that he was to pay the instalments out of his earnings. That is not this case. The sale here is a sale to a third person; it is immaterial that he was the trustee. It is a sale to a third person, and a sale of that kind is authorized by the *Bankruptcy Act*. There having been no close of the liquidation, by the terms of the *Bankruptcy Act* all the property which belonged to the debtor at the commencement of the liquidation, together with all that he afterwards acquires during the continuance of the liquidation, passes to the trustee. Now here the liquidation still continues, it not having been put an end to either formally or in substance, and consequently the after-acquired property goes to the trustee. This is not a case of composition; it would be a mistake to call it so. The composition of 5s. in the pound was only a measure of the price which the trustee was to pay for the property which was sold to him. He was to pay for it enough to realize 5s. in the pound for all the creditors who had proved, and the costs of the liquidation. But that is not a composition; it is merely a measure of the price which was to be paid. There being nothing whatever amounting to a close of the liquidation, by the express terms of the Act all the property acquired by the debtor during the continuance of the liquidation passes to the trustee. I quite agree with what has been said by my learned Brothers as to the costs.

Solicitors for Appellant: *Gregory, Rowcliffes, & Co.*, agents for *C. W. Newlands, South Shields*.

Solicitors for Trustee: *Pyke & Parrott*, agents for *J. G. Joel, Newcastle-on-Tyne*.

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In re ROBSON.EMLEY *v.* DAVIDSON.

[1877 R. 178.]

Mortmain Act—Charitable Gift—Debt payable out of Real Assets—Hiring Rooms.

A settlor by deed covenanted to pay within twelve months the sum of £20,000 to trustees on trust for his wife for her life, with remainder to the settlor for his life, with remainder as his wife should by will appoint. The wife by her will appointed the £20,000 to the same trustees on trust to pay thereout legacies amounting to £2000 and certain life annuities, and to pay the residue as she should by deed appoint. By a deed-poll she appointed the residue to charitable uses. All the instruments were executed at the same time. The settlor survived his wife and died, not having paid the £20,000. Part of his estate at his death consisted of impure personalty, and the pure personalty would be insufficient for payment of the £20,000:—

Held (reversing the decision of *Bacon*, V.C.), that the £20,000 was a mere debt from the settlor's estate, and though it would be in part payable to the trustees for the charity out of the proceeds of land, the gift of the residue to charitable uses was not in any part void under the *Mortmain Act*.

A direction to hire rooms does not bring a gift within the *Mortmain Act*. *Jeffries v. Alexander* (1) considered.

BY an indenture dated the 8th of August, 1868, and made between *James Robson* of the first part, *Mary Elizabeth Robson*, his wife, of the second part, and *Thomas Emley* and *W. Gray* of the third part, after reciting that *James Robson* was minded to settle £20,000 for the benefit of his wife, it was witnessed that for carrying his said intention into effect he the said *James Robson* did, for himself, his heirs, executors, and administrators, covenant with *Emley* and *Gray* that he would before the expiration of twelve calendar months from the date thereof pay to *Emley* and *Gray*, the sum of £20,000; And it was thereby agreed and declared that *Emley* and *Gray* should stand possessed of the said sum of £20,000 upon trust either to retain the said sum of £20,000 upon the same securities as the same were then invested in, or to alter the investments from time to time as the said *James Robson* and *Mary Elizabeth Robson* should during their joint lives

direct, or as the survivor of them during his or her life should direct, each new investment to be on Government or real securities in *Great Britain*, or in the debentures of some railway company incorporated by Act of Parliament and paying dividends to its ordinary shareholders: And upon trust to pay the interest, dividends, and annual proceeds of the said trust funds to the said *Mary Elizabeth Robson* for and during the term of her natural life for her sole use and benefit; and from and after her decease upon trust to pay the said interest, dividends, and annual proceeds to the said *James Robson* for and during his natural life; and from and after the decease of the survivor of them the said *James Robson* and *Mary Elizabeth* his wife, upon such trusts as she the said *Mary Elizabeth Robson* should by her will or any codicil or codicils thereto direct or appoint.

Mary Elizabeth Robson, by her will, dated the 8th of August, 1868, in exercise of the power to her given by the said indenture, bequeathed and appointed unto *Emley* and *Gray* the said sum of £20,000 upon trust to pay or invest for the persons therein mentioned legacies amounting to £2000, and on trust to invest a further part of the trust fund for the payment of certain life annuities, and on the decease of each annuitant to pay the portion of trust moneys so invested to the treasurers of certain charities: And as to all the rest, residue, and remainder of the trust fund and of her personal estate, she directed that the trustees of her will should pay the same to such persons as she by a deed-poll to be executed by her should direct and appoint.

By a deed-poll also dated the 8th of August, 1868, *Mary Elizabeth Robson* directed that the trustees of her will should transfer and pay all the rest, residue, and remainder of the £20,000, and all her other personal estate and effects, to certain trustees for a charity for twenty aged females as therein mentioned; one of the trusts being "to hire rooms for the reception of twenty females."

Mary Elizabeth Robson died in 1870, and *James Robson* died in 1877. The £20,000 had never been paid to the trustees of the indenture of 1868, nor had any interest thereon been paid, and the deed of covenant had remained in the possession of *James Robson*.

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The estate of *James Robson* at the time of his death consisted of £12,970 pure personalty, and of £14,050 impure personalty, being £350 secured by a legal mortgage and £13,700 secured by an equitable mortgage. This last sum was stated to be a trade debt due to *James Robson* for which this security had been given.

An action was brought for the administration of the estate of *James Robson*, in which the question was raised whether the appointment under the deed-poll for charitable purposes was not void so far as the money would come out of the impure personalty of *James Robson*. The question was argued on further consideration before Vice-Chancellor *Bacon* on the 13th of April, 1880.

Hemming, Q.C., and *Williamson*, for the trustees.

North, Q.C., and *Whitworth*, for *Jane Robson*, who was interested under the will of *James Robson*.

Rigby, Q.C., and *Stirling*, for the Crown.

BACON, V.C.:—

If *Jeffries v. Alexander* (1) and if *Fox v. Lownds* (2) had not been decided as they have been, plainly and clearly, no doubt there might be great scope for the argument which Mr. *Rigby* has adduced to the Court. The only distinction he seeks to draw between *Jeffries v. Alexander* and the present case is that in that case the testator retained to himself the power of revoking the charitable disposition which he had made, and that in the case now before me there is no such feature to be found, the covenant being unqualified. But in that case the nature of such a covenant was considered most fully by all the Courts in which that case was discussed; and the apparent validity of the covenant to pay was clearly before the House of Lords, and as clearly before the Lords Justices, yet they declined to submit the question involved to any such test. Therefore I think it may be left out of the present case altogether. But the plain decision there was, that the Court being satisfied that the whole transaction was an

(2) 8 H. L. C. 594. 7/11/81 226 (2) Law Rep. 19 Eq. 453.

attempt to evade the operation of the *Mortmain Act*, it was therefore to be considered as a gift by the testator—the donor there, the husband here—for charitable purposes. It was therefore a gift which, in the administration of that estate, the Court would not dispose of without regard to the rules as to paying charitable legacies out of pure personal estate. The distinction Mr. *Rigby* endeavoured to draw, in my opinion, does not make any difference in the application of the principle. The charitable dispositions contained in the wife's will and in the deed-poll which was executed on the same date are merely charitable legacies, and are payable out of the pure personal estate, and out of that alone. I do not think there is any other question, as the question of appropriation does not seem to me of the slightest importance. I do not see what is the effect of the provision that the trustees should either retain the £20,000 upon the same securities as it was then invested in, or should alter the investments from time to time as the husband and wife may direct. As Lord *St. Leonards*, in the judgment in *Jeffries v. Alexander* (1), said, this is no case of marshalling assets, but this is putting the pure personalty on the one side and the impure personalty and the realty on the other, and out of one the charitable legacies are to be paid, whilst the other fund cannot be resorted to for any such purpose. There must be an abatement if the pure personal estate is not sufficient to satisfy the intention of the parties. That there was a charitable gift by the husband in my opinion is clear. The machinery that was resorted to does not alter the application of the rules of administration in this Court; and, looking at the case in that point of view, I do not see what there is to dispute.

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The Attorney-General appealed.

It was admitted on the appeal that the deed-poll must be proved as testamentary.

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Rigby, Q.C., and *Stirling*, for the Crown :—

The Vice-Chancellor appears to have thought that the settlor had schemed to evade the *Mortmain Acts*, but it is not so, and it is a mere accident that the £20,000 will in part be paid out of

(1) 8 H. L. C. 665.

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real estate. The settlor might have died soon after he executed the deed, and then his widow might have dealt as she pleased with the money. *Jeffries v. Alexander* (1) does not apply. In *Fox v. Lownds* (2) there was a distinction drawn between postponement to debts and postponement to legacies.

Hemming, Q.C., and Williamson, for the trustees.

Horton Smith, Q.C., and Whitworth, for Sarah Robson :—

This was, as in *Jeffries v. Alexander* and *Fox v. Lownds*, a mere scheme to evade the *Mortmain Act*. No doubt it is a mere covenant to pay, but the trustees might have invested the money on mortgage, or might keep it so invested as they found it: *Ashworth v. Munn* (3). In *Brook v. Badley* (4), a very similar case, it was held that the bequest altogether failed. This is a mere gift of impure personalty, and the particular mode by which it is got at does not signify. The settlor might have had real estate, and it could then not be held that the proceeds of the sale of real estate could go to a charity. In no way can impure personalty go to a charity.

JESSEL, M.R. :—

The question involved in this case is certainly very peculiar, but I think that by upholding the judgment of the Vice-Chancellor we should be extending the rule beyond what has hitherto been done. It is not for the Court to say that because something further has happened which might or might not have been contrary to the intention of the Legislature, therefore a transaction is ineffectual; and, taking it independently of decision, I cannot see how any question can arise. This is not a gift of real estate, or of anything connected with real estate. [His Lordship then stated the facts of the case.]

Now, though the deed seems to have remained in the man's possession, he was liable to pay this money within twelve months, and if he had done so, it would have been invested in consols when of course the question could not arise. It was no doubt

(1) 8 H. L. C. 594.

(2) Law Rep. 19 Eq. 453.

(3) 15 Ch. D. 363.

(4) Law Rep. 3 Ch. 672.

a debt created without value, but still it was a debt, and, as the law now stands, a debt for all purposes. If he had become bankrupt the debt would have ranked for dividend, and if he had died insolvent it would have ranked for dividend. It is a mere accident that by our law a debt can now be enforced out of real estate, and in this particular case there is not the slightest reason for believing that the settlor had any intention to avoid the statute. I do not think that he knew anything about the statute, or had ever heard of pure or impure personalty. His object was no doubt to establish a charity, but not to avoid the statute. Within the twelve months he might have called in the mortgage and have received the money, and, that being so, it seems to me that there is no objection to paying that debt after his death out of his assets, real or personal. It happened that his wife died first, and when he died it turned out that some part of his assets consisted of realty. Then let me look at the mischief within the statute. It does not affect a case of this kind; the creditors cannot get real estate in any shape or way; they are only entitled to have the mortgage called in, and to have the mortgaged property turned into money to pay their debts. There is nothing devoted in any shape to land or to an interest in land, or kept out of the power of alienation which it was the real object, or one of the real objects, of the statute to keep always in view, and, looking at the nature of the transaction, there is no ground whatever upon which this debt can be refused payment out of the assets.

But when we look at the decisions there is something more to be said. The great case on the subject is *Jeffries v. Alexander* (1). That was a very remarkable case, and not the less remarkable for the variety of judicial decisions to which it gave rise. When it was first heard before the House of Lords there were six Judges assisted by four Law Lords, and the six Judges were three and three, and the four Law Lords two and two, so that they were exactly divided. Then Lord *St. Leonards* was called in as the eleventh Judge to decide the case. He decided in favour of reversal, but that was reversing the decision of two Lords Justices, so that if they are reckoned there was still a majority the other way. I ought to mention that not only were the two Lords

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Justices reversed, but they had taken the trouble to consult two Common Law Judges, who had agreed with them. The result is, that a case of the utmost difficulty was treated by almost all the Judges as depending upon its peculiar circumstances, and when we come to look at the reasons given by the majority of the Law Lords, whose opinion ultimately prevailed, and whose decision is binding upon this Court, we shall find that two circumstances, neither of which occur here, were very much relied upon, and indeed, I may say, were treated as the real grounds of the decision.

The first circumstance was that the testator's assets were almost entirely real, and he knew that the charities could not be provided for except out of real assets; that he had consulted Mr. *Ram*, a counsel who had written on the Law of Assets, and that this device had been invented by that counsel for the purpose of getting rid of the difficulty caused by the statute. It was in fact a device. The second circumstance was this: the form of the instrument was such that no action could be brought upon it in the lifetime of the settlor, and it only provided for payment if he thought fit. It was a covenant to pay out of the remainder or residue of his personal estate after the debts and legacies had been paid, and he might afterwards have incurred any amount of debts or given any number of legacies so as to exhaust his property, in which case there would have been nothing out of which to pay. It was in fact a settlement of the residue, or bulk of the residue, of his estate, and of course, so far as it was impure personalty, it was in that way a disposition of impure personalty after his death by way of gift. That those were the grounds I think is quite plain. I will first of all take what Lord *Campbell* said (1): "To see that what was attempted by the covenantor was of this nature we have only to read the deed, and to attend to the state of his property and his affairs when he executed the deed, and the state of his property and his affairs at his death. It was only from the proceeds of his mortgages that the £60,000 could be paid, and from the proceeds of the mortgages the £60,000 must and will be paid if the statute does not interpose. Attending likewise to the other deed, and to the

(1) 8 H. L. C. 647.

will which he executed at the same time, and to the manner in which he kept and described these three instruments, there can be little doubt that he really meant them all to be testamentary, and jointly to constitute his last will and testament. He carefully concealed the charity deed, and he knew well that even if it had got into the hands of the trustees, no action could have been brought upon it against him in his lifetime, but that upon his death, if the intended effect was given to it, it would operate as a charge upon his chattels real, there being no other fund from which the sums destined to create the different charities could be paid." Then Lord *St. Leonards* says (1): "If you look at what this testator has done, you will find that upon the evidence before us his clear intention was to evade one Act, the *Legacy Duty Act*, and to violate another, the *Mortmain Act*. The indenture upon which the question has arisen is of course connected with the will, and we must take them both together, for he refers to the dispositions which may be made by his will, and therefore the will operates in point of fact upon the deed. They were found together; they were executed at the same time; they were intended as one conveyance, and to have one operation. In my opinion the intention, and the true construction of this instrument is, that it is a voluntary settlement of so much as the testator has directed of his personal estate (the nature of which I will presently consider) to be secured by this deed, in anticipation of his will. Equity, in the case of a bond to settle a certain sum of money, does not regard the penalty or the nature of the security, but it looks to the act which was intended to be performed, and, therefore, the condition of a bond has frequently been considered and acted upon as an agreement for a settlement. Now the Act of Parliament expressly strikes at a settlement made in any way attempting to charge property, or to transmit property of the nature of chattels real to a charitable use. The testator was perfectly aware of the statute. We see by the evidence that he had very great assistance, particularly of a gentleman at the Bar who had, we know, written upon the very subject of Assets, and was therefore very competent to advise him, although he seems to have hazarded what, when I was at the Bar, I always declined to do, an attempt to violate an

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(1) 8 H. L. C. 657. 7 June 1881. 224

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Act of Parliament." Then upon the other point he says (1): "I do not speak of this as a deed which he locked up and kept in his custody from the notice of others. I am content to treat it as a legal obligation, but it is a legal obligation that does not bind either him or his property. And the only way in which you can look at it fairly is this: that if sufficient property was permitted to remain to answer it, then, according to his view, this deed should operate as a deed directing charities. So far as the deed directs charities, if any funds should ever come to be enjoyed by the charity trustees that deed will be perfectly valid; but so far as it attempts to bind any portion of the property which the law says shall not be converted to charitable uses, it is simply void. In the case which I have cited the intention was clearly to bind all the property of the testator as far as a judgment could bind it at the very moment of the judgment being acted upon; and yet that wholly failed by the rule of law. Here the testator does no such thing, for he provides most explicitly by the deed that his property is not in any manner to be affected until all his debts, of every description, and all his legacies are paid. He goes beyond the decision of the Court of Equity. You need not trouble yourself with the rule of the Court of Equity, for he goes beyond that rule. He does not stop at the payment of debts, and then create a voluntary obligation as against legacies, but he takes debts and legacies and postpones this voluntary donation till every other gift and disposition present or future is satisfied." The only other opinion on both points was that given by Lord *Kingsdown*. He says (2), "It is contended by the Appellants (1st) that this deed creates no obligation on which any action could be brought against the maker in his lifetime; that no breach of covenant could occur until twelve months after the death of the maker of the deed. No argument was offered against this construction by the counsel for the Respondent, and it appears to me to be the true one. The obligation therefore, whatever its true effect, is one to be enforced only against the assets of the maker." He further says: "It is an obligation which it depends upon the maker himself to defeat by any disposition either *inter vivos* or testamentary, just as it may seem good to him. Not only the

(1) 8 H. L. C. 662. 7 Jan 45. 214

(2) 8 H. L. C. 674. 7 Jan 45. 212

sum expressed in the deed is not to be preferred to legacies, but it is not even to be on a par with legacies. It is to be postponed to all legacies. It is in truth a mere engagement by the covenantor to let the charities take the benefit of the general residue of his estate to the extent of £60,000 if he does not dispose of such residue to any other purposes. The charities are merely substituted for the heir-at-law and next of kin. A residuary bequest or a voluntary disposition of the residue by deed would defeat the effect of the covenant." Then he says, "In what proper sense of the expression it is possible to consider as a debt a sum of money of which payment can neither be compelled against the supposed debtor in his lifetime nor against his assets after his death unless he thinks fit to make no other disposition of those assets by any disposition either *inter vivos* or testamentary, I am at a loss to understand." Then he finally says: "Again, which is still more important, the Judges do not think it important to determine whether the covenant could have been enforced against the settlor in his lifetime or not. But this seems to me of the very essence of the case. If a legacy be an appropriation of the assets as they exist at the death, why is a voluntary engagement to pay out of assets which may remain after legacies are satisfied less an appropriation?"

I think, therefore, that we find in all three judgments those two grounds not only commented upon, but treated, as Lord *Kingsdown* says, as of the essence of the case. We have no other guide to go by in applying this case to other cases which may more or less resemble it, and we must refer to those judgments, or opinions as they were then called, in order to ascertain the *ratio decidendi*, and when we find that neither of these circumstances occur here, especially that which was treated as the turning point in the case, it seems to me that we should not be applying, but mis-applying that case if we held it to govern the case before us.

Another case that was cited is a decision of my own, *Fox v. Lownds* (1), which I decline to comment upon, but it is sufficient to say that I believe it has been followed by other Judges. That disposes of the main portion of the argument in this case. There was a suggestion that because at the time of the death of

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the covenantor his assets happened to consist to a great extent of mortgages, on that ground alone, and without more, the statute must apply; but that is a doctrine which has never been upheld. The fact that a creditor requires the real assets to be sold or turned into money, because it is the only remedy that he has, is not within the purview of the statute at all, nor has that ever been so decided.

That being so, the only other point is that which the learned Judge seems to have decided in favour of the charity, that is whether the terms of the deed itself are such as to bring it within the purview of the Act. I think they are not. To put the deed shortly, the charity is for the purpose of providing poor women with rooms, but the trustees who hire the rooms do not put anything in them; the hiring is only to be temporary, from time to time, and different rooms are to be hired; and there is no ground whatever for saying that such a charity cannot be established without purchasing land, or building houses, or doing anything which requires land to be permanently devoted to charity.

LUSH, L.J. :—

I am of the same opinion. I think the only difficulty here arises from the case of *Jeffries v. Alexander* (1), which was no doubt a very difficult case. The learned Judge whose decision is appealed from felt himself bound by that case, and, speaking for myself, if it were not for that case, and if we simply had to decide the present question by reference to the terms of the *Mortmain Act*, I should have felt no difficulty whatever; and that is, after all, what we ought to do in every case. No doubt we can gather a great deal from decisions, but our object should be to bring the case before us, and test it by the statute, and see whether it is within the meaning and spirit of the statute or not. It seems to me, for the reasons which have been given by the Master of the Rolls, there are essential differences between that case and the present. The *Mortmain Act* (9 Geo. 2, c. 36) says that no gift of any lands to or in trust for the benefit of any charitable uses shall be good, unless the conveyance is made

(1) 8 H. L. C. 594.

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under the hand and seal of the donor twelve months at least before his death, and is inrolled within six calendar months afterwards. A subsequent section provides that all gifts of land to or in trust for charity which shall be made in any other form than in the form pointed out by the Act, shall be void to all intents and purposes. In *Jeffries v. Alexander* (1) there was a charge upon land, which was what the parties intended from the first, and the deed was to give effect to that intention, and, therefore, the House of Lords came to the conclusion which has been mentioned. Looking at the present case, I can see no element in it which involves any violation of the two sections I have referred to. The testator gave a bond to settle £20,000 upon his wife for the benefit of himself and his wife, and ultimately to such purposes as she should by deed or will appoint, and the money was to be payable by him within twelve months. He was a man who had accumulated a fortune by trade, and the only interest in land that he held was an equitable mortgage taken as security for a debt due to him. The £20,000 might have been recovered from him at the expiration of twelve months, and must have been paid by him in money, and if it was not paid the trustees might have taken the security in land, but then they must have realized it and have paid themselves in cash. After his death the liability remained on his executors, and an action might have been brought against them for the money, and they must have paid in money; although they might have been brought into a Court of Equity and might ultimately have paid the money out of the proceeds of real estate. But the trustees could not get the real estate, as it must have been sold and the proceeds divided amongst the creditors. I see nothing in the case which shews any intention of the parties to avoid the *Mortmain Act*, and, secondly, nothing to shew that the provisions of the *Mortmain Act* were in fact or must have been violated in order to carry out their purposes.

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LINDLEY, L.J.:—

I am of the same opinion. The case which has been argued before us is one not free from apparent difficulty, but when we understand it properly, and understand *Jeffries v. Alexander*,

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that difficulty vanishes. The *Statute of Mortmain* nowhere prohibits the assignment or settlement of debts for charitable purposes; the word "debt" is not to be found there, although the words interest in land are to be found, and in them mortgages and charges on land are included. The Court of Appeal, in *Alexander v. Brame* (1), decided that the settlement of debts to charitable purposes did not avoid the statute; the House of Lords never said the contrary, nor did any Judge ever dissent from that proposition. So far from that, having read the case, it appears to me that we may take it as pretty well decided that a simple settlement of debts to charitable purposes does not come within the statute. The decision in the House of Lords in *Jeffries v. Alexander* (2) was, that what was there called a debt was not in substance a debt at all, but was the residue of a man's property, whatever he chose to make it amount to after bequeathing legacies. The covenant in *Jeffries v. Alexander* was most extraordinary, as it amounted to this, that the settlor would leave property amounting to £60,000, after paying all his debts and legacies, to charitable purposes. It was a debt that could not be sued upon in his lifetime, a debt which could hardly be sued upon at all if he had not property to answer the covenant, and the substance of the decision was that it was a settlement of the residue of his property. *Fox v. Lownds* (3) is a case of a similar kind, and not like this, which is a case of a pure and simple covenant to pay £20,000. To hold that this is within the *Statute of Mortmain* would be to extend that statute to interests which have never yet been held to be within its strict meaning. Further than that, one cannot help seeing that although it may happen that a debt may be paid out of real estate, that is not sufficient. A debt may have to be enforced by judgment, and the judgment may have to be enforced by *fi. fa.* or *elegit*, but that will not bring the case within the statute, and for that purpose I may appeal with confidence to the various judgments in *Alexander v. Brame* and *Jeffries v. Alexander*. Mr. Whitworth pressed us in his short but able argument with the case of *Brook v. Badley* (4). That was a bequest of a legacy by the legatee to charitable purposes, and the legacy so bequeathed was treated by Lord Cairns as

(1) 7 D. M. & G. 525.

(2) 8 H. L. C. 594.

(3) Law Rep. 19 Eq. 453.

(4) Ibid. 3 Ch. 672.

partly payable out of personalty and partly out of real estate, and this was ascertained when the bequest to the charity took effect; so that the legacy bequeathed was not apportionable, and, therefore, the gift failed. If this debt had been a debt payable out of the assets of a person deceased before it was dedicated to charity, that case might apply, but it was not, as it was a mere chance who died first; and, in point of fact, it would be wrong in principle to say that because the husband's estate has been allowed to be administered, therefore this charitable disposition does not take effect. The mere fact that he is dead, and that in order to recover the money recourse must be had to his real estate, does not bring the gift within the statute.

For these reasons, I think the decision ought to be reversed, and that Mr. *Rigby's* contention should prevail.

Solicitors for the Crown: *Hare & Co.*

Solicitors for *Jane Robson*: *Waterhouse & Winterbottom*, agents for *J. & R. S. Watson & Dendy*, Newcastle.

Solicitors for the Trustees: *Williamson, Hill, & Co.*, agents for *Ingledeu & Daggett*, Newcastle.

C. M.

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*Ex parte* LAMB. *In re* SOUTHAM.

*Appeal—Time—Notice to Registrar of County Court—"Forthwith"—*  
*Bankruptcy Rules, 1870, rr. 143, 144.*

When an act is required by a statute or a rule of Court to be done "forthwith," the word "forthwith" must be construed with regard to the object of the provision and the circumstances of the case.

The *London* agents of the country solicitors of an appellant from an order made by a County Court in bankruptcy entered the appeal with the Registrar of Appeals in *London* on Friday, the 5th of August, the last possible day, but did not post a copy of the appeal notice to the country solicitors until the following day, and it was not received by them until Monday, the 8th of August, and on that day they sent a copy of the notice to the Registrar of the County Court:—

*Held*, that the copy of the notice had not been sent to the Registrar of the County Court "forthwith" on entering the appeal as required by rule 144, and that consequently the appeal was out of time.

ON the 12th of July, 1881, the trustees in the bankruptcy of *T. W. Southam* applied to the County Court at *Manchester* for

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an order that *Alfred Smith* and *Whittaker Newton* should deliver up to them a piano and a harmonium which they claimed as part of the bankrupt's property. The Judge dismissed the application, with costs to be paid by the trustees.

On the 5th of August, 1881 (a Friday), a notice of appeal from this order, dated on that day, was entered by the *London* agents of the trustees' solicitors at *Manchester* with the Registrar of Appeals at the *London* Bankruptcy Court, and on the same day the deposit of £20 was paid into the *Bank of England*. The 5th of August was the last day for entering the appeal in compliance with rule 143 of the Bankruptcy Rules, 1870.

On the 8th of August, 1881 (a Monday), the trustee's solicitors at *Manchester* received by post from their *London* agents a copy of the notice of appeal, and sent a copy of it to the Registrar of the County Court. The office of the *London* Bankruptcy Court and the *Bank of England* close at 4 P.M. on a Friday. The office of the County Court closes at 1 P.M. on a Saturday. Letters for the night mail from *London* to *Manchester* can be posted at the General Post Office as late as 7 P.M. The office of the *London* agents of the trustees' solicitors was in the City. There was no evidence to shew at what time on the 5th of August the appeal was entered, nor at what time the letter to the trustees' solicitors containing the copy of the notice of appeal was posted.

The appeal came on to be heard by the Chief Judge on the 7th of November, 1881.

*Winslow*, Q.C., and *E. Cooper Willis*, for the Appellants.

*Smyly*, for the Respondents, took the preliminary objection that the appeal was out of time.

Rule 144 of 1870 requires that, upon entering an appeal, a copy of the appeal notice shall be sent "forthwith" by the Appellant to the Registrar of the Court appealed from.

In *Ex parte Sillence* (1), in this Court, it was held that, in order to satisfy the word "forthwith," the notice must be sent either within the twenty-one days or "as soon as possible" afterwards. In this case the period of twenty-one days expired on the 5th of August, and on that last day the notice was entered with



the Registrar of Appeals. There is no question that this notice was in time ; but, notice of the appeal not having been forwarded to the country solicitors until the 6th, it was not served on the Registrar of the County Court until the 8th. This was not a "sending forthwith" within the meaning of the rule. The above decision was followed, also in this Court, in *Ex parte Donni-thorne* (1).

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—

Winslow, Q.C., and *E. Cooper Willis*, *contra* :—

The exigency of the rule has been reasonably satisfied. The draft of a notice of motion by way of appeal is often a long and complicated document. The reason why the Appellants did not write to the country until Saturday was that there was some doubt whether the Chief Judge would sit again before the Long Vacation. On Saturday, having ascertained this fact one way or the other, they wrote ; and the country solicitor coming down to his office on Monday morning, found the letter and immediately acted upon it. In each of the cases cited the interval was very much larger ; in *Ex parte Sillence* (2) it was nearly two months after the expiration of the twenty-one days ; in *Ex parte Donni-thorne* it was three days after.

Smyly, in reply :—

The rule will be construed with greater strictness where an appellant waits till the very last hour of the twenty-first day before he enters his appeal.

BACON, C.J. :—

In accordance with the decisions which have been referred to, I must hold that this notice came too late. I do not think I ought to relax the interpretation which has been put upon the rule. The consequence is, that the appeal must be dismissed with costs.

J. B. D.

From this decision the trustees appealed. The appeal was heard on the 1st of December, 1881.

C. A.

(1) 40 L. T. (N.S.) 660.

(2) 7 Ch. D. 238.

C. A. Winslow, Q.C., and E. Cooper Willis, for the Appellants:—

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It was not necessary that the copy of the appeal notice should be posted on the same day on which the appeal was entered; it was sufficient that it was posted the next day. The object of sending the copy to the Registrar of the Court appealed from is that the person who has obtained an order may be able to search and discover whether there is to be an appeal. Only one day was lost, and the appeal could not be heard till November. The decisions of the Chief Judge in *Ex parte Sillence* (1) and *Ex parte Donnithorne* (2) are distinguishable. In both of them a much longer time had elapsed after the entry of the appeal before the notice was served on the Registrar of the Court appealed from. "Forthwith" is not so stringent a word as "immediately"; it only means that the act is to be done within a reasonable time: *Archbold's Practice* (3). It is sufficient to send notice of the dishonour of a bill of exchange the next day. It is only intended that the copy shall be sent within a reasonable time.

[JESSEL, M.R., referred to *Reg. v. Price* (4), in which it was held that where a notice was served on a person to appear "forthwith" to answer a criminal charge he was bound to appear as soon as he reasonably could after service of the notice upon him; *Tennant v. Bell* (5), where, in an action against an overseer for not delivering a copy of a poor-rate to an inhabitant "forthwith" on demand, it was held that it ought to be left to the jury to say whether, under the circumstances, the notice had or had not been given within a reasonable time; *Spenceley v. Robinson* (6); and *Hyde v. Watts* (7), in which a covenant to insure the covenantor's life "forthwith" was construed as giving a reasonable time to effect the insurance. Those cases shew that the meaning of the word "forthwith" must depend on the subject-matter with reference to which it is used.

LUSH, L.J.:—It must depend on the circumstances of each case.]

The rule is only directory.

(1) 7 Ch. D. 238.

(2) 40 L. T. (N.S.) 660.

(3) 13th Ed. p. 175.

(4) 8 Moo. P. C. 203, 213.

(5) 9 Q. B. 684.

(6) 3 B. & C. 658.

(7) 12 M. & W. 254.

Smyly, for the Respondents, was not heard.

JESSEL, M.R. :—

I think that the word “forthwith” must be construed according to the circumstances in which it is used. Where, as in *Hyde v. Watts* (1), there is a covenant to insure a man’s life, there must of necessity be some delay, for the act could not be done in a moment. But where an act which is required to be done “forthwith” can be done without delay, it ought to be so done. In the present case the Appellant chose to enter his appeal on the very last day. He knew that the object of entering an appeal is that the other side may be able to ascertain whether there is to be an appeal or not. He knew that when it is a country case the appeal has to be entered with the Registrar of the County Court. In other words, he knew the object of the rule, that in a country case the appeal must be entered in the country as well as in *London*, was that the Respondent might have an opportunity of searching the register in the country. He is allowed twenty-one days to enter his appeal in *London*, and when he has done that he must enter it “forthwith” in the country. Did he do this? The affidavits do not shew either at what time the letter to the country solicitors was posted, or where it was posted; all we know is that the country solicitors did not receive the letter till the Monday morning. It appears to me that, considering the objects of the rule and the circumstances of the case, the rule has not been complied with. The notice was not given to the Registrar of the County Court within a reasonable time having regard to the circumstances. The appeal must be dismissed.

BAGGALLAY, L.J. :—

I am of the same opinion.

LUSH, L.J. :—

The word “forthwith” has not a fixed and absolute meaning; it must be construed with reference to the objects of the rule and the circumstances of the case. In the present case the Appellants

(1) 12 M. & W. 254.

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had not to wait to do the act till some one asked them to do it; it was simply their duty to do it. The entry of the appeal in *London* and the giving notice to the Registrar in the country were one continuous act, which was to be done within a reasonable time. I do not think the letter was posted within a reasonable time when the Appellants lost the three hours from 4 to 7 P.M. on the Friday, within which it might have been posted. The appeal is therefore too late, and it must be dismissed.

Appeal dismissed with costs.

Solicitors for Appellants: *Pritchard, Englefield, & Co.*, agents for *E. Storer, Manchester*.

Solicitors for Respondents: *Phelps, Sidgwick, & Biddle*, agents for *Sale, Seddon, & Co., Manchester*.

W. L. C.

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[1879 B. 613.]

V.-C. B.

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Nov. 22, 23;
Dec. 3.

Specific Performance—Contract by Vendor having only partial Interest to sell the Entirety—Remedy of Purchaser.

By a memorandum in writing, Defendant agreed to let, and Plaintiffs agreed to take, business premises for one year, with an option for Plaintiffs at the end of the year to have a lease for seven, fourteen, or twenty-one years. Plaintiffs, having gone into possession under the agreement, and having laid out money in alterations, at the end of the year gave notice of their intention to exercise the option; but when the Defendant's title came to be investigated it was found that she was possessed of only a moiety of the premises, the other moiety being vested in her son, a minor.

The Defendant was decreed to perform specifically so much of the contract as she was able to perform, with an abatement of one moiety of the rent.

An inquiry as to damages was refused, there being no evidence that the Plaintiffs had sustained any damage.

TRIAL OF ACTION.

By a memorandum in writing dated the 19th of June, 1877, and signed by the Plaintiffs, *Walter Beeken Burrow* and *John Severn Burrow*, of the one part, and the Defendant, *Emma Augusta Scammell*, widow, of the other part, the Defendant agreed to let, and the Plaintiffs agreed to take, certain premises in No. 3, *Mark Lane Square, Great Tower Street, City*, for one year from the 24th of June, 1877, at the net annual rent of £200, payable as therein mentioned. The agreement contained the following proviso:—

“And it is hereby mutually agreed that at the expiration of the term hereby granted, the said *E. A. Scammell*, at the option of the said *W. B.* and *J. S. Burrow*, shall execute a lease for seven, fourteen, or twenty-one years from the 24th of June, 1878, at the net annual rent of £200 as aforesaid, such lease to be prepared by the said *E. A. Scammell*'s solicitors, at the expense of the said *W. B.* and *J. S. Burrow*, and a reasonable notice to be given prior to the expiration of this term to prepare and execute the said lease.”

The Plaintiffs, formerly in business as opticians at *Great Malvern*,

V.-C. B. having gone into the additional business of wine merchants' engineers (of which an important part was the manufacture of iron wine bins), desired to extend their business to *London*, and took the above premises for this purpose. ?

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The Plaintiffs went into possession under the agreement, and laid out considerable sums of money in alterations, and also in advertisements.

On the 27th of May, 1878, the Plaintiffs wrote to the Defendant a letter giving notice of their intention to exercise their option of taking a lease for twenty-one years. The Defendant thereupon consulted with her solicitors, and an investigation of her title was made, resulting in the discovery that she was entitled to only one moiety of the house and premises, and that the other moiety was vested in her son, *Joseph Barton Scammell*, a minor, born in about 1864, as heir-at-law of his father, the Defendant's late husband, who died intestate in 1875. The Defendant's right to dower in this moiety had been barred.

A correspondence followed. On the 5th of June, 1878, the Defendant's solicitors wrote to the Plaintiffs as follows:—"We regret to find she" (the Defendant) "has no power to grant a lease. There is, however, no fear of your being disturbed. A moiety of the property appears to be vested in her son, who is of the age of about fourteen years, and consequently his moiety cannot well be dealt with until he attains twenty-one." In a subsequent letter it was suggested on the Plaintiffs' behalf that some means might be found to obviate the difficulty, and the Defendant's solicitors stated their inability to remove it.

The action was commenced on the 25th of November, 1879, and the Plaintiffs, by their amended statement of claim, claimed as follows:—

"That the Defendant may be ordered specifically to perform the said agreement constituted by the said memorandum and letter" (of the 27th of May, 1878), "to the extent of her interest in the same premises, with a proportionate abatement of the rent to be reserved in respect thereof; and for that purpose may be ordered to execute a lease thereof to the Plaintiffs in accordance with such direction.

"An inquiry what sum ought to be allowed and paid by the

Defendant to the Plaintiffs by way of damages in respect of the non-performance or incomplete performance of the said agreement."

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By the amended statement of defence (delivered on the 18th of June, 1880), the Defendant said she was, until several days after she had received the said letter (of the 27th of May, 1878), wholly ignorant of her inability to grant a valid lease. The premises were of recent construction and of compact plan, and if a partition of them were possible, which the Defendant questioned, and were made, the value of the moiety of the minor, as well as of that of the Defendant, would be greatly depreciated. She then pleaded:—

"The said premises are of such a character that a partition thereof cannot be made, or a lease of an undivided moiety thereof be properly granted, and the Defendant denies (as the fact is) that she is able to grant a valid lease of the said premises to the Plaintiffs to the extent of her interest therein. And even if the Defendant were able (which she says she is not) to grant a valid lease of the said premises to the extent of her interest therein, she submits and contends that under the circumstances of the case she is not bound by the said memorandum of agreement, and ought not to be ordered to grant a lease of the said premises to the extent of her interest therein."

The defence then stated that in 1878 the *Metropolitan and Metropolitan District Railway Companies* gave the Defendant notice of their intention to apply to Parliament for compulsory powers over (*inter alia*) the premises, for the purposes of their proposed lines. The Defendant and *Joseph Barton Scammell*, her son, were expecting notices to treat for the sale of the premises.

Issue was joined on the 22nd of June, 1880.

Extracts from the Defendant's evidence are stated in the judgment of the Court below.

Higgins, Q.C., and *Eastwick*, for the Plaintiffs:—

We ask that the Defendant may be ordered specifically to perform the agreement to the extent of her interest, with a proportional abatement of rent. Then we ask for an inquiry of what sum ought to be allowed for damages for incomplete performance;

V.-C. B. and a reference to Chambers for inquiry as to special damage arising from this cause.

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The rule of the Court was laid down by Lord *Eldon* in *Mortlock v. Buller* (1), and recently by Vice-Chancellor *Hall* in *Hooper v. Smart* (2); also by Lord Justice *James* when Vice-Chancellor, in *Barnes v. Wood* (3), which decision was approved by Lord *Hatherley*, C., in *Castle v. Wilkinson* (4). The decision of Vice-Chancellor *Hall* applies particularly to this case, because the Defendant will get more rent, after abatement, under this contract, than she would have got had she contracted to demise only a moiety. To the like effect is a decision in this branch of the Court of *Barker v. Cox* (5), and another by Mr. Justice *Fry* in *Horrocks v. Rigby* (6). The declaration made by the Court in *Oceanic Steam Navigation Company v. Sutherland* (7) is a further example.

Mackenzie v. Hesketh (8) was, like the present, a case of mistake. *Central Railway Company of Venezuela v. Kisch* (9) is an authority to shew that where an applicant for shares, trusting to representations made to him, omitted to examine papers to which he had access, which would have afforded him the information, the want of which he alleged as his ground for rescinding the contract, he was nevertheless held not disentitled to relief. The rule as to the measure of damages is laid down in *Hadley v. Baxendale* (10); *Jaques v. Millar* (11); *Bunny v. Hopkinson* (12); *Rolph v. Crouch* (13).

Marten, Q.C., and *T. O. Harding*, for the Defendant:—

The jurisdiction is discretionary; and as this contract cannot be fulfilled in its entirety, the Court will not decree specific performance of any part of it. If a vendor, without fraud, is incapable of making a good title, the purchaser is entitled to recover only the expenses he has incurred; not compensation in

(1) 10 Ves. 292, 315.

(2) Law Rep. 18 Eq. 683, 685.

(3) Ibid. 8 Eq. 424.

(4) Ibid. 5 Ch. 534, 536.

(5) 4 Ch. D. 464.

(6) 9 Ch. D. 180.

(7) 16 Ch. D. 236, 246.

(8) 7 Ch. D. 675.

(9) Law Rep. 2 H. L. 99.

(10) 9 Ex. 341, 354.

(11) 6 Ch. D. 153.

(12) 27 Beav. 565, 567.

(13) Law Rep. 3 Ex. 44.

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damages for the loss of his bargain: *Bain v. Fothergill* (1). Expenses incurred in advertising are clearly out of the question, as these must have been incurred wherever the Plaintiffs' business was carried on.

In this case the Plaintiffs had constructive notice of the Defendant's title: *Patman v. Harland* (2); and the doctrine of *caveat emptor* applies: *Besley v. Besley* (3).

The part of the ruling in *Mortlock v. Buller* (4) which applies to this case is to be found in the marginal note at the beginning of the report, namely, that the Court is not bound to decree specific performance in every case where it will not set aside the contract. The present is a case of honest mistake, in which the contract made was wholly different from that which would have been made if the parties had known the facts. Such a contract will not be enforced. In *Wheatley v. Slade* (5) Vice-Chancellor *Shadwell* held that the remedy of specific performance of part of an agreement, with a deduction for the deficiency, is not to be allowed where a large portion of the estate cannot be conveyed.

[BACON, V.C.:—That was an interlocutory application.]

Marten, Q.C., in continuation:—

The proposition is stated generally. Other instances where the Court refused specific performance are *Maw v. Topham* (6); *Day v. Wells* (7); *Webster v. Cecil* (8); *Earl of Durham v. Legard* (9); *Cochrane v. Willis* (10); *Bingham v. Bingham* (11).

Plaintiffs, as lessees, are not in the same position as that of a purchaser in fee, because, if a partition should be made, a purchaser in fee would get a good title as to a moiety.

Higgins, in reply:—

The Court has power to sanction a lease by the minor: *In re Letchford* (12).

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(1) Law Rep. 7 H. L. 158.

(2) 17 Ch. D. 353.

(3) 9 Ch. D. 103.

(4) 10 Ves. 292.

(5) 4 Sim. 126.

(6) 19 Beav. 576.

(7) 30 Beav. 220.

(8) Ibid. 62.

(9) 34 Beav. 611.

(10) 34 Beav. 359; S. C. on appeal,
Law Rep. 1 Ch. 58.

(11) 1 Ves. Sen. 127.

(12) 2 Ch. D. 719.

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To the authorities before cited may be added *Sugden's Vendors and Purchasers* (1); *Fry on Specific Performance* (2).

Marten, in reply on the authorities cited in reply, referred to *Sugden's Vendors and Purchasers* (3), and to *Fry on Specific Performance* (4).

At the close of the argument

BACON, V.C., referring to the claim for damages, observed that the claim could be for prospective damages only, inasmuch as no damage had, so far as the Court was informed, been hitherto sustained.

Higgins, observed that the Plaintiffs had no security that they should be allowed to remain undisturbed.

BACON, V.C., asked, if an inquiry were directed, what there would be to inquire into.

Higgins :—I do not address myself to the question for damages, unless the Court should refuse to decree specific performance. If the Court should refuse, then I should ask for damages for breach of the whole contract; or, if the Court should decree specific performance of only a moiety, with abatement, then I say that the Plaintiffs, if they should be disturbed at the instance of the owner of the other moiety, would be entitled to damages for the breach of contract. The events being future, we should be content with liberty to apply.

BACON, V.C. :—

I cannot see my way to grant any such inquiry. You cannot anticipate damages.

Dec. 3. BACON, V.C. :—

The circumstances out of which this action arises are of somewhat unusual occurrence. The questions to be decided are by no

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| (1) 14th Ed. p. 305. | (3) 14th Ed. pp. 316, 317, 318. |
| (2) 2nd Ed. p. 534, s. 1226. | (4) Page 537, s. 1233. |

means free from difficulty, but the material and only important facts are reasonably clear and undisputed.

[His Lordship stated the facts of the case and the nature of the Plaintiffs' claim, as above mentioned, and continued:—]

In support of their first claim the Plaintiffs' counsel insist that it is a well-established rule of Courts of Equity that in cases where from defect of title the specific performance of a contract in its entirety has become impossible, the party claiming performance is entitled to so much of the subject of the contract as can be performed, and to be compensated for so much as remains unperformed.

The Defendant resists the claim upon several grounds. Reliance is placed upon the recent decision of the House of Lords in *Bain v. Fothergill* (1), in which it was held that, in a case where the specific performance of a contract by the vendor was impossible for want of title, the vendor was entitled to no other damages than the amount of such expense as he had incurred by reason of the vendor's default, and that he could not sue for damage sustained by the loss of his bargain. It appears to me that the case cited, which is of unquestionable authority, has no application to that before me. The Plaintiffs do not ask for damages because they have been disappointed of a benefit which they expected to make, and might have made if the contract had been fulfilled, nor for any other damage. All they ask is, that, a title being shewn by the Defendant to only half what they contracted for, they should be secured in the possession of that half, and be made liable to pay no more than half the rent they would have had to pay to the Defendant if she had demised to them the entirety of the house. It is further insisted for the Defendant that, her inability to perform the contract having arisen from a mere mistake, no relief can be had against her, and several cases were cited in which parties were relieved from the consequences of an honest mistake. As where a vendor, having stated through inadvertence that he would sell for a sum far below that which he intended to name as the purchase-money, was relieved against his unintentional error; or where the quantity of acres in land, the subject of the contract, had been plainly misreckoned, the mistake was redressed so as to

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read the words of the contract according to the intention of the parties. It cannot be disputed that Courts of Equity have at all times relieved against honest mistakes in contracts, where the literal effect and the specific performance of them would be to impose a burden not contemplated, and which it would be against all reason and justice to fix, upon the person who, without the imputation of fraud, has inadvertently committed an accidental mistake; and also where not to correct the mistake would be to give an unconscionable advantage to either party. But no case has been referred to, nor, as I believe, can be found, in which the mistaking party has sought for, or could derive, any advantage beyond the mere relief from the burden. I have not the slightest doubt or suspicion but that the Defendant has acted in perfect good faith, and sincerely believed she was entitled to deal, as she purported to do, with the entirety, any more than I can doubt that she is able to perform her engagement as to the moiety. I have not heard any reason suggested why she should not perform her engagement to the extent of her ability. On the contrary, in the affidavits made by her in support of her defence, at paragraph 9, she says, "I have always been and am ready and willing, if and in so far as it was or is in my power to do so, to grant to the Plaintiffs a lease of the said premises, but owing to the state of the title as afore-said, and owing to the infancy of the said *Joseph Barton Scammell*, I am informed and believe that it is and has always been impossible for me to grant, or to obtain, or procure the granting of a valid lease of the entirety of the said premises." And she adds (paragraph 10), "I believe that the nature of the premises is such that a partition thereof would be attended with great difficulty and expense, and that the letting or selling value of the premises would be seriously depreciated by any such partition, and the share and interest of the said *Joseph Barton Scammell* therein would be greatly injured and diminished." Upon this I may say that it appears at least doubtful whether a partition could be effectually or properly made of the house in question. Certain it is that the relief sought by the Plaintiffs does not suggest or involve the necessity of partition. The rights of the infant, who is no party to this suit, cannot be affected by any decree to be now made, and I most carefully avoid saying or doing anything which

can affect those rights. The rule of the Court, and the principles upon which it is founded, are very distinctly stated by Lord *Eldon* in *Mortlock v. Buller* (1), in which his Lordship says, "I also agree, if a man, having partial interests in an estate, chooses to enter into a contract, representing it and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract." And further he says, the vendor "is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the Court will not hear the objection by the vendor that the purchaser cannot have the whole." In that case the plaintiff sued for a specific performance. The Court was of opinion that there was no such contract as could be enforced, and the bill was dismissed. It was at a time when the Court did not extend its jurisdiction to the subject of damages for non-performance; and in cases where no decree was made for rescinding the contract, the party suing was left to his action for damages in a Court of Law. In that case the plaintiff, although defeated in equity, is said to have brought an action against Mr. *Buller*, which was compromised on terms very advantageous to the plaintiff, a fact which I do not dwell upon much, but which I read from *Sugden's Vendors and Purchasers* (2). The principle of law so stated by Lord *Eldon* has been several times adverted to in subsequent cases, but never questioned. It is adopted by Lord *St. Leonards*, and is, as I take it, to be now treated as a settled rule. In support of the defence reference was made to *Wheatley v. Slade* (3), in which, upon an interlocutory motion for an injunction, the Vice-Chancellor discharged an injunction which had been granted, and expressed an opinion that the plaintiff was not entitled to a partial performance with an abatement. But in that case the defendant, who had contracted to sell an entirety, was in fact entitled to little more than a moiety of the estate, while the entirety was subject to a mortgage nearly as large in amount as the whole purchase-money. It is not surprising that the motion was refused, but that case was not a judicial decision in support of

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(1) 10 Ves. 292, 315.

(2) 14th Ed. p. 217, n.

(3) 4 Sim. 126.

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the contention for which it is cited ; and I may add, that by subsequent text-writers doubts have been expressed whether it should be followed. It is so treated in *Sugden's Vendors and Purchasers* (1) and in Mr. Justice *Fry's* book on Specific Performance (2). In cases where, for other reasons, specific performance was refused, there could be no decree for partial performance with abatement or compensation, as in *Price v. Griffith* (3), where, the agreement being found to be invalid, the plaintiffs' claim for so much as the defendant could perform was overruled. Lord Justice *Knight Bruce*, in his judgment, recognises the very principle of *Mortlock v. Buller* (4), although he decided that it could not be applied to the case before him. The Plaintiffs contracted for the entirety of the house, and the Defendant says that when she entered into the agreement she believed she was entitled to the entirety ; no suspicion had ever crossed her mind that she was not competent to deal with the entirety, and she certainly did mean to bind the entirety. Therefore, that the parties were *ad idem*, and that the subject was the same is beyond all question. The difficulty has arisen because by subsequent discovery it turns out—not that they were both mistaken—not that the Plaintiffs were at all mistaken in thinking they were to have the entirety—but that the Defendant only was mistaken in the belief that she could deal with the entirety, having a firm belief in her mind, as her affidavit and the pleadings plainly shew, that she could. No intention of dealing with anything less than the whole had crossed her mind at that time ; and the relief which the Plaintiffs claim, and which, in my opinion, they are entitled to, now that the mistake has been discovered, is, that they may have specific performance, not of the whole, because the state of the case makes that impossible, but they ask for that which by *Mortlock v. Buller* is stated to be the law of the Court, and which has been confirmed in repeated cases since, to which I need not further allude—they desire to have that which the Defendant can give them, if the Court thinks she ought to do so.

The Plaintiffs have, as the evidence shews, at considerable expere established their business in the house in question, and

(1) Page 317.

(2) Sect. 1226.

(3) 1 D. M. & G. 80.

(4) 10 Ves. 292, 315.

during the three years which have elapsed since they first had possession, that business has become extensive and lucrative. To disturb them in their possession would, no doubt, be highly disadvantageous to them. To refuse the relief they claim would leave them without protection, and probably expose them to considerable loss, and this for no other reason than that the Defendant has made a mistake. The Defendant would acquire the right of determining the possession of the Plaintiffs at her mere will, and it would confer upon her an advantage wholly unconscionable and inconsistent with the terms of her contract; it would in fact be relieving her from her mistake at the expense and to the damage of the Plaintiffs, who are in no degree to blame. It appears to me, therefore, that the Plaintiffs are at least entitled to have such a lease granted to them as the Defendant can, and, as she says, she is willing to execute if the Court should so decree, reserving to her the amount of the rent to which she is entitled. The requisite instrument must, if necessary, be settled in Chambers. All I can add in concluding is, to express my sincere regret that, with parties so respectable as those in this action, neither of them meaning or desiring anything unfair or unreasonable, some means of accommodating their difference more amicable than this litigation should not have been resorted to.

There will be a decree for specific performance of the agreement to the extent of the Defendant's interest; and the rent will be a moiety of the rent agreed upon. The Plaintiffs will have their costs; but there will not be an inquiry as to damages, since I find no damage has been sustained beyond the sums which the Plaintiffs must have laid out under any circumstances in advertisements and other matters connected with their business.

Solicitors for Plaintiffs: *Hunt & Son*, agents for *Quarrell & Nevinson*, Great Malvern.

Solicitors for Defendants: *Hollams, Son, & Coward*.

J. B. D.

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Nov. 19, 21.

In re HORNER'S ESTATE.POMFRET *v.* GRAHAM.

[1880 H. 2243.]

Will—Construction—Gift to Children for Life with Remainder to their Children—Dying without Children—“Survivor or Survivors” not construed “other or others.”

Testator gave by will, made in 1834, the residue of his estate to trustees to pay the income, after the death of his wife, unto such of his four named children as should be living at the decease of his wife, during their lives; and after the decease of any one or more of such children who should leave children he gave the share, whether original or accruing, of the one so dying in trust for his or her children; and, in the event of any one of his children dying without leaving children who should attain the age of twenty-one years, then he gave the share, whether original or accruing, of such of them so dying in trust for the survivor or survivors of his said children during their lives, and after their deaths for their respective children, and their heirs, executors, and administrators. There was no gift over. The four children of the testator survived the widow. One child died leaving two children who attained the age of twenty-one years, and the other three children died without issue:—

Held, that the words “survivor or survivors” must be so read, and not as “other or others.”

RALPH HORNER, who died on the 3rd of March, 1834, by his will, made on the 16th of January in that year, after appointing five executors, gave all his estates to them, their heirs, executors, &c., upon trust to pay his debts, funeral and testamentary expenses, and certain legacies, and to invest the residue in manner in the will mentioned, and to pay the income to his wife during her life.

“And from and after the decease of my said wife upon this further trust to pay the” income, half-yearly, “unto and amongst such of my said children, *George Horner, Jane Pomfret, Mary Preston*, and *Anne Horner*, as shall be living at the decease of my said wife, for and during their” lives, equally, except that *Jane Pomfret* was to be paid a small sum yearly more than the other three children, and there was a provision that in the event of *George*

dying in the lifetime of his wife she was, during widowhood, to be paid the portion of the income which *George* would have been entitled to, "and after the decease of any one or more of my before-named children who shall leave any lawful child or children living at his, her, or their decease then," subject to the life interest of the wife of *George* in the event mentioned, "the portion or share or other interest, whether original or accruing, of such of my said children respectively so dying of and in my said" estates, and the income "which they respectively shall be entitled to during their respective lives shall be in trust for all and every the child or children of my said children respectively who shall live to attain the age of twenty-one years, their respective heirs, sequels in right, executors, administrators, and assigns, as tenants in common, but not to be paid, assigned, conveyed, or transferred until the youngest of such children, if more than one, of my said children respectively shall have attained the age of twenty-one years," the income to be in the meantime applied towards the maintenance, education, and benefit of such child or children. "And in the event of any one or more of my said children dying without leaving any lawful child or children living at their decease respectively who shall live to attain the age of twenty-one years, then the portion or share or other interest or respective portions or shares or other interests, whether original or accruing, of and in the said" income of the estates, "of such of them so dying shall be in trust for the survivor or survivors of my said children for and during their respective natural lives, and from and after their respective deceases, then the portion or share or other interest or respective portions or shares or other interests, whether original or accruing, of and in the said" estates "which they respectively shall be entitled to during their respective lives, shall be in trust for their respective children and the heirs, sequels in right, executors, administrators, and assigns of such children respectively, and be paid, transferred, assigned and conveyed to them respectively at the time hereinbefore mentioned."

The testator's widow died many years ago leaving the four children above named living.

The testator had seven children. Three predeceased him, and one of them, *Ralph Horner*, left issue.

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On the widow's death the income of the estates was divided in equal fourths, with the exception above mentioned, the small sum extra to *Jane Pomfret*.

Jane Pomfret had two children, who had attained the age of twenty-one years, and she died in 1854.

Anne Horner died a spinster in 1862.

George Horner survived his wife, and died without issue in 1869, and *Mary Preston* died without issue in 1879.

The Plaintiffs, the two children of *Jane Pomfret*, claimed to be the only persons beneficially interested in the trust estates, and they desired to have the same conveyed to them; but the Defendant, who had married a daughter of *Ralph Horner*, and was one of the two trustees of the estates, would not admit that they were entitled to any more than one-fourth of them. The Plaintiffs brought the action for a declaration that they were the only persons entitled, and for consequential directions, and, if necessary, for accounts.

Robinson, Q.C., and *Cozens-Hardy*, for the Plaintiffs:—

The question in this case is whether the words “survivor or survivors” can be read as “other or others,” and it is submitted that they can be. The case is governed by the decisions in *Wake v. Varah* (1) and *Badger v. Gregory* (2), where, at page 84, Lord Justice *James*, when Vice-Chancellor, stated this very case. The testator intended that the surviving descendants of a child should take the property, and the words used are sufficient to bring the case within *Badger v. Gregory*. In support of the view submitted for the Plaintiffs there are the cases of *In re Arnold's Trusts* (3), *Waite v. Littlewood* (4), and *Lucena v. Lucena* (5). In the last case it is clear that the Court of Appeal did not dissent from the decision of Vice-Chancellor *James* in *Badger v. Gregory*. Considering all these authorities, it is confidently submitted that the word “survivors” should not receive its strict construction, but that it should be read “others,” and that would make an absolute gift over to the Plaintiffs of all the property.

(1) 2 Ch. D. 348.

(3) Law Rep. 10 Eq. 252.

(2) Law Rep. 8 Eq. 78.

(4) Ibid. 8 Ch. 70.

(5) 7 Ch. D. 255.

Hastings, Q.C., and *Freeman*, for the Defendant :—

It is submitted that the true construction of the will, will be that the words “survivor or survivors” should not be read “others.” The case of *Beckwith v. Beckwith* (1), which was decided in November, 1876, governs this case. In that case there was no gift over, but in *Lucena v. Lucena* (2), which was decided by the Court of Appeal in November, 1877, there was a gift over; and in *Wake v. Varah* (3) Lord Justice *Baggallay* said the provision in the will there, “and in case all my said children shall die without leaving issue as aforesaid, then in trust for the heirs, executors, administrators and assigns of the survivor,” supplied the necessary clue to the intention. The general result is that the gift over is the test in all these cases, as Lord Justice *James*, in *Beckwith v. Beckwith*, affirmed when he said that Lord Justice *Baggallay* had, “in going through the case of” (*Wake v. Varah*), “found the necessary clue which was considered to be the governing thing, the *ratio decidendi*.” In this case there is no gift over.

Robinson, in reply, referred to the case of *Church v. Tyaske* (4), and submitted that the decision which the Plaintiffs asked for could be given quite consistently with the cases which had been cited on their behalf and independently of the fact of there being no gift over.

HALL, V.C. :—

This case involves the question which has been more or less dealt with in the many authorities which have been referred to. The case of *Badger v. Gregory* (5) is one of them. The view taken by Lord Justice *James*, at that time Vice-Chancellor, was that he had to take into consideration the two elements in the case :—the gift over to the survivor for his life, and then to his children afterwards; and also the case of the gift over, and he was forcibly impressed with the apparent unreasonableness of the gift over to the children of a tenant for life, even of an accrued share, being

(1) 25 W. R. 282.

(3) 2 Ch. D. 348, 355.

(2) 7 Ch. D. 255.

(4) 12 Ch. D. 205.

(5) Law Rep. 8 Eq. 78.

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made dependent upon the parent of those children being alive when the accruer took place; and he thought that that of itself was "almost conclusive," that the word "survivor" was put in contradistinction to the one so dying, and meant the one who did not die childless. But he did not say what would be the effect in that bare case, because in that case there was the other consideration. The question was afterwards considered in the case of *Beckwith v. Beckwith* (1), but there there was no gift over; there was, however, a provision that on the death of a daughter without having children who should become entitled to vested interests, her share, whether original or accruing, should go "to his other daughters or daughter surviving in equal shares if more than one, and the share or shares which should so accrue to any of his said daughters should be held upon the trusts" in the will concerning the original share. There being no gift over, it had, in that state of things, to be considered what would have been the effect of a gift over. Lord Justice *James* was of opinion that the law in reference to the construction of wills in which there were gifts over to the survivors had been in a state of uncertainty, looking at the decisions. He considered there had been decisions, and there is no doubt there have been, in which "survivors" had been construed as ordinarily meaning "others," and he said in reference to that that the Court had to consider the question very fully in the case of *Wake v. Varah* (2), *Waite v. Littlewood* (3), and *Badger v. Gregory* (4), and that Lord Justice *Baggallay*, in *Wake v. Varah*, "found the necessary clue which was considered to be the governing thing," and it was in that case found in the words, "and in case all my said children shall die without leaving issue as aforesaid, then in trust for the heirs, executors, administrators, and assigns of the survivor," *i.e.*, where there is a gift over, on a total failure of issue, the word "survivors" must be read "others." Lord Justice *James* said that he, in *Badger v. Gregory*, endeavoured to explain the rule. His words were, "in the absence of any such ground for raising the implication, I am of opinion that we must leave the words to bear their ordinary natural and grammatical interpretation." That was the view of

(1) 25 W. R. 232.

(2) 2 Ch. D. 348, 355.

(3) Law Rep. 8 Ch. 70.

(4) Ibid. 8 Eq. 78.

Lord Justice *James*, who had apparently a strong inclination to give effect to the words by giving them a wider construction. The question next came before the Court in the case of *Lucena v. Lucena* (1), and the judgment of the Master of the Rolls I think shews that he considered the gift over being for life merely, was a strong circumstance in favour of the Court giving a construction other than the ordinary one to the word "survivors." What the Master of the Rolls said was:—"Where a testator has intended to settle the fund among his children and his descendants according to a class, it would certainly be a most extraordinary notion to attribute to him an intention that the mere fact of a parent who only takes a life interest surviving a given period is to determine the title of the descendants to succeed. That, no doubt, makes a very strong view of the case to take as against the literal interpretation; that is to say, you must not take a manifestly absurd view leading to manifestly absurd consequences, if you can by possibility avoid it." The Master of the Rolls then went on to deal with other parts of the case, and referred to several authorities. But Lord Justice *Baggallay*, in his judgment in *Beckwith v. Beckwith* (2), said: "I can see nothing capricious or unreasonable in a testator who has made a disposition in favour of all his daughters and their families taking in equal shares making a further provision that in the event of any of his daughters dying without leaving issue, that the share to which her issue (if there had been any) would have succeeded should go amongst the 'survivor or survivors' to the exclusion of the children of a deceased sister." Such a provision did not strike his Lordship's mind as being unreasonable. When the question came before me in the case of *Church v. Tyacke* (3), it was apparently argued without my attention being particularly drawn by counsel to the decision in *Beckwith v. Beckwith*. I referred to that case myself, but upon further consideration I think, that as the authorities now stand, I did not give so much force to the decision in that case as I ought to have done.

I say now, looking at all the authorities and considering all the opinions expressed by the Judges, that when I have such a case

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(1) 7 Ch. D. 255.

(2) 25 W. R. 282, 283.

(3) 12 Ch. D. 205.

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as the present before me I ought not to decide it upon the view that what has been said by one Judge to be an absurdity—a gift over to survivors for life with remainder to children—is alone enough to construe “survivors” as “others.” I am of opinion that I ought to hold that where that is the sole circumstance to be relied upon the word must have given to it its natural and ordinary meaning, and, that being so, I hold that the words “survivor or survivors” must be so read in this case.

Solicitors: *Peace & Waller*, agents for *W. E. Tattershall, Sheffield*; *Rogerson & Ford*.

T. F. M.

COOPER v. CRABTREE.

[1881 C. 4841.]

FRY, J.

1881

Dec. 13.

Nuisance—Obstruction—Injunction—Cause of Action—Reversioner.

The Plaintiff was the owner in fee of a cottage; the Defendant owned some land immediately adjoining. The Plaintiff alleged that the Defendant had erected on the Plaintiff's land a boarding on poles, in order to block out the access of light to a window in the cottage, and thus prevent the acquisition of a prescriptive right to the light, and that the Defendant had in so doing committed a trespass.

The Plaintiff also alleged that the poles and boarding produced a constant rattling and creaking noise, and thus caused an intolerable nuisance to him and his tenants. The Plaintiff claimed an injunction to restrain the trespass and the nuisance. At the trial it was proved that the cottage was in the occupation of a weekly tenant of the Plaintiff who was not a party to the action. Evidence was given that the poles and boarding caused a nuisance to the tenant and his family, but there was no evidence of any diminution in the value of or other injury to the reversion :—

Held, that the poles and boarding were not a structure of such a permanent character as necessarily to injure the reversion, and that, in the absence of any positive evidence of injury to the reversion, the Plaintiff, being only a reversioner, could not maintain the action.

Amended Bill of Costs
THE writ in this action was issued on the 27th of August, 1881.

By his statement of claim, delivered on the 27th of September, 1881, the Plaintiff alleged that he was the owner in fee of four cottages, to the north of which was some land belonging to the Defendant. There was, as the Plaintiff alleged, a strip of land 1 ft. 9 in. in breadth between the northern wall of the cottages and the northern boundary of the Plaintiff's land, *i.e.*, the boundary between his land and the land of the Defendant. The Defendant, on the contrary, alleged that the strip 1 ft. 9 in. wide was his property. The gable end of one of the cottages contained a kitchen window facing north, and an attic window also facing north.

The statement of claim contained the following allegations :—
“Some time since the Defendant, in order (as he alleged) to obstruct the light of the kitchen window, erected a brick wall in front thereof, and in the month of August last, in order also (as he alleged) to obstruct the light of the attic window, he erected

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two poles thirty feet in height, and placed on the top of them a hoarding, or board, opposite and close to the attic window. The brick wall and the poles are on the Plaintiff's land, and the Defendant has committed trespasses in erecting them and allowing them to remain on the Plaintiff's land. The poles and hoarding are, moreover, an intolerable nuisance to the Plaintiff and his tenants by reason of the constant rattling and creaking noise produced thereby. The Plaintiff complained to the Defendant of such trespass and nuisance, and the Defendant, on the 22nd of August last, proposed to make an attempt to reduce such rattling and noise by placing wire ropes or guys on his own land on one side only of the poles, but such alteration only increased the nuisance, as the wires cause much whistling, and the rattling and creaking noises are worse than before, and the Plaintiff would be entitled to have the poles, hoarding, and wires removed even if they were erected on the Defendant's own land. The cottage containing the said windows is in the occupation of tenants of the Plaintiff, and they have complained of the great nuisance caused by the poles, hoarding, and wires, and such nuisance is in fact a serious injury to their health and comfort, and deprives them of their natural and proper rest, and they state that unless such nuisance is removed they will be unable to reside in the cottage, and will have to leave it. The Plaintiff and his tenants have suffered considerable damage from the aforesaid acts of the Defendant, and they will continue to suffer damage thereby unless such acts are restrained and such relief granted as is hereinafter prayed."

The Plaintiff claimed, 1. an injunction to restrain the Defendant from allowing the brick wall and the poles, hoarding, and wires to remain on the Plaintiff's land, and from placing or causing to be placed any other erections upon or committing any other trespasses on the land; 2. an injunction in any event to restrain the Defendant from allowing the poles, hoarding, and wires to remain so as to cause a nuisance to the Plaintiff or his tenants or to the Plaintiff's cottage; 3. that the Defendant might be ordered forthwith to remove the brick wall and the poles, hoarding, and wires; 4. damages for the injury caused by the trespass and nuisance.

* The Defendant by his statement of defence denied the trespass

and the nuisance, and asserted that the brick wall and the poles and hoarding stood entirely on his own land. He said that the Plaintiff's cottages were built up to the extreme northern boundary of his land.

At the trial the case as to the brick wall was abandoned by the Plaintiff. It appeared that the cottage in question was occupied, and had been occupied since February, 1881, by one *Appleyard* and his family, he being a weekly tenant of the Plaintiff. *Appleyard* gave evidence of the nuisance to himself and his family caused by the rattling of the poles and hoarding. No evidence, however, was adduced to shew that the value of the Plaintiff's reversion had been reduced or that any injury had been caused to it by the Defendant's acts.

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Cookson, Q.C., and *E. Ford*, for the Plaintiff.

Fischer, Q.C., and *W. Baker*, for the Defendant :—

This is in fact an action of trespass, and the evidence shews that the Plaintiff is not in possession of the property. In that respect, therefore, he cannot maintain the action.

As to the alleged nuisance, the Plaintiff, being a reversioner, cannot maintain the action unless he shews a nuisance of a permanent character, and an injury to the reversion: *Mott v. Shoolbred* (1); *Jones v. Chappell* (2). The only nuisance proved is to the tenant, and the hoarding is evidently only of a temporary character. It may be replaced by a brick wall.

[FRY, J.:—In the present case the reversion is subject only to a weekly tenancy. In *Mott v. Shoolbred* the tenant had a much larger term.]

In *Jones v. Chappell* the tenancy was a weekly one. It is quite sufficient if the nuisance be one which may cease.

They were stopped by the Court, who called on

Cookson, in reply :—

[FRY, J.:—*Baxter v. Taylor* (3) shews that a reversioner cannot maintain an action of trespass, because he is out of possession.]

(1) Law Rep. 20 Eq. 22.

(2) Law Rep. 20 Eq. 539.

(3) 4 B. & Ad. 72.

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The possession of the tenant is that of the landlord.

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[FRY, J.:—Not for all purposes.]

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This must not be treated as a mere common law action of trespass.

[FRY, J.:—If it is an action on the case for an obstruction or nuisance, you must shew a substantial injury to the reversion.]

The placing of an obstruction on a man's land must be a substantial injury to the land.

[FRY, J.:—That depends upon whether it is a permanent obstruction.]

The object being to obstruct the access of light, it must be assumed that there is an intention permanently to obstruct it.

In *Baxter v. Taylor* (1) the injury complained of was the trampling down of the soil and grass; that was essentially only a temporary injury and an injury only to the tenant. It was in substance like *Mott v. Shoolbred* (2). The principle of those cases is this, that he who brings an action sounding in damages must shew that he is the party damaged. Here, according to the Defendant's own case, the poles and hoarding have been put up in order to block up a window; there is no presumption that he will remove them at the end of a week. In *Jones v. Chappell* (3) the injury was only a temporary one. Absolute permanence is not necessary, relative permanence is enough. It is sufficient if, during the time for which it is probable that the obstruction will remain, it will affect the Plaintiff's interest. In *Sturges v. Bridgman* (4) the nuisance complained of was the grinding of a pestle and mortar, and it was not suggested that that was a merely temporary nuisance.

[FRY, J.:—The plaintiff there was in possession.]

Pattisson v. Gilford (5) is distinguishable from the present case. As to possession, as soon as I shew title the law will presume possession. The Court can now grant an injunction whenever it is just and convenient to do so, and, seeing that the Defendant intends to interfere with my land, it will stop him from doing so,

(1) 4 B. & Ad. 72.

(3) Law Rep. 20 Eq. 539.

(2) Law Rep. 20 Eq. 22.

(4) 11 Ch. D. 852.

(5) Law Rep. 18 Eq. 259.

unless it can see that he never had any intention of doing anything which would extend beyond the period of my tenant's tenancy.

[FRY, J., referred to *Mumford v. Oxford, Worcester, and Wolverhampton Railway Company* (1).]

That case was like *Mott v. Shoolbred* (2); there was nothing to shew that the reversion would ever be affected. But the proper inference in the present case is that the obstruction was intended to be prolonged beyond the period of the tenant's interest. If the Plaintiff did not bring his action now, it would afterwards be said that he had come too late.

FRY, J.:—

In my judgment the Plaintiff's action fails. He seeks relief on two grounds; one is called in the pleadings a trespass, the other a nuisance. From the Plaintiff's own evidence it appears that he is quite incapable of bringing trespass, because he has shewn that, from February of last year, and during the whole time of the alleged grievances, one [*Appleyard* has been in possession as tenant to the Plaintiff of the house in question and that which the Plaintiff claims as the curtilage of the house, and it is familiar law that an action of trespass cannot be brought by any person except the person in possession.

There remains, however, the question whether the Plaintiff is entitled to bring an action in respect of the alleged entry on his land in the possession of the tenant, and also for the injury said to be caused by the nuisance arising from the noise of the poles and of the boards. That nuisance is said to be of this description, that it prevents Mr. *Appleyard's* children from sleeping with comfort in the attic. I assume, for the present purpose, that the Plaintiff is or was entitled to that portion of the land upon which the poles have been erected, but, in my judgment, he is nevertheless not, upon the evidence before me, able to maintain an action on the case as a reversioner in respect of the user of those poles, nor on the ground of nuisance from noise. It appears to me that the law with regard both to the alleged entry and trespass, as

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(1) 1 H. & N. 34.

(2) Law Rep. 20 Eq. 22.

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it has been called, and the noise is substantially the same, and that it is necessary for a person who states himself to be a reversioner to shew one or other of two things. He must shew either that his reversion is damaged, or that the injury is of a permanent character. Perhaps in substance these two things are the same.

The only question which seems really of any difficulty in this case is, whether the alleged acts create a permanent injury to the Plaintiff's land? Upon that point I will refer first to the case of *Jackson v. Pesked* (1). The marginal note is this: "If the plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion; otherwise the want of such allegation will be cause for arresting the judgment. Therefore, where the plaintiff declared as reversioner of a yard and part of a wall which *W. F.* occupied as tenant to him, and that the defendant on &c., and on divers days, &c., wrongfully placed on the said part of the wall quantities of bricks and mortar, &c., and thereby raised it to a greater height than before, and placed pieces of timber, &c., on the said wall, overhanging the yard, *per quod* the plaintiff during all the time lost the use of the said part of the wall, and also, by means of the timber, &c., overhanging the wall, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and said part of wall have been injured, to the damage of the plaintiff, &c., without stating that his reversion was prejudiced: the Court arrested the judgment."

I cite that authority in order that I may ask myself these three questions: first, has the Plaintiff in the present case shewn any actual damage to his reversion? Of that there is no evidence at all. In the next place, is the injury done by the insertion of these poles one of such a permanent nature as to be necessarily injurious to the reversion? It seems to me that I am bound to answer that question in the negative. The structure is of a very slight character, one which can be easily removed in a short space of time, and which, from its nature, does not appear to be in-

(1) 1 M. & S. 234.

tended for a permanent purpose. It is not like a house or any other structure which we speak of as of a permanent character.

The third question which I ask is this: Does not the case to which I have referred shew that the mere act of building a brick wall even upon another wall (an act which appears to be of a more permanent character than that which is complained of in the present case) is not of so permanent a character as to entitle the reversioner to an action merely on that ground? That case, therefore, seems to throw very great light upon the present inquiry.

It has been followed by many others. In *Baxter v. Taylor* (1) an action on the case was brought by a reversioner for entering on land held by a tenant on lease, and the entry was made in exercise of an alleged right of way. The injury there, no doubt, was not of a permanent character, but was only a temporary injury to the grass and land. There Mr. Justice *Taunton* laid down the rule thus (2):—"He" (speaking of the plaintiff) "could not maintain an action of trespass in his own name, because he was not in possession of the land, nor an action on the case for injury to the reversion, because in point of fact there was no such permanent injury as would be necessarily prejudicial to it." And Mr. Justice *Patteson* said (3): "To entitle a reversioner to maintain an action on the case against a stranger, he must allege in his count, and prove at the trial, an actual injury to his reversionary interest."

Again, *Simpson v. Savage* (4) shews that the erecting of a chimney and using it in a way which created a nuisance was not actionable by the reversioner, because the nuisance might be stopped at any moment. And the same view was taken by the present Master of the Rolls in *Jones v. Chappell* (5), which determined that machinery of a permanent description, erected for the purpose of carrying on a trade which was likely to be permanent, was not of such a permanent character as necessarily to create an injury to the reversioner, because the machinery might be stopped at any moment. Then again I ask whether what was held there not to be sufficiently permanent was not of a more permanent description than what is complained of in the present case? I think it was, because, if

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(1) 4 B. & Ad. 72.

(3) 4 B. & Ad. 76.

(2) *Ibid.* 75.

(4) 1 C. B. (N.S.) 347.

(5) Law Rep. 20 Eq. 539.

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—

these poles were taken down, the alleged trespass would go and the alleged nuisance would go. The Plaintiff, therefore, not having shewn that there is any actual injury to his reversion (the tenant has not left as in some of the cases he was shewn to have left), and the erection not being in its nature of such a description as necessarily to injure the reversioner, it appears to me that he has not a cause of action, and I am, therefore, bound to dismiss the action with costs.

Solicitors for Plaintiff: *Layton & Jaques*, agents for *Holroyde & Smith, Halifax*.

Solicitors for Defendants: *Williamson, Hill, & Co.*, agents for *Foster, England, & Foster, Halifax*.

W. L. C.

In re BONNER, DECEASED.

CHITTY, J.

TUCKER *v.* GOOD.

1881

Nov. 7, 8.

[1876 B. 553.]

Will—Construction—Second Cousins—First Cousins once removed.

A testator, after giving to his sister a life interest in the whole of his property, devised and bequeathed the same after her death upon trust for sale, and to divide the proceeds amongst "my second cousins."

The testator had no "second cousins" either at the date of his will or at his death, or any born afterwards:—

Held, that first cousins once removed were entitled.

Slade v. Fooks (1), followed.

THOMAS BONNER, by his will, dated the 15th of January, 1873, gave, devised, and bequeathed to his sister, *Mary Ann Bonner*, the whole of his property for life, and, after her decease, devised certain property in *Bridport* to *Ann Udall* absolutely, and gave, devised, and bequeathed all the rest, residue, and remainder of his property to *Frederick Good* upon trust to pay certain annuities to *Ann Udall* and *Ann Udall Bartlett*, and upon further trust to pay each of "my second cousins" the sum of £100 as soon as conveniently might be after the death of his sister, and, after the decease of either of the annuitants, upon trust to sell and dispose of certain of the lands and premises on which the annuities were charged, and to divide the proceeds thereof, after deducting the expenses attending the sale, equally amongst "my said second cousins"; and, after the decease of *Ann Udall*, upon trust to sell certain other property, and to divide the proceeds, after deducting the expenses of sale, equally amongst "my second cousins as aforesaid"; with a similar direction as to certain other property particularly mentioned, and also a like division as to the remainder of his property; and the testator declared that if "any such second cousin" should be dead leaving lawful issue, the share which any such "second cousin" would have taken should go to such issue equally between them if more than one, and if only one, then to such only child.

(1) 9 Sim. 386.

CHITTY, J. The testator died on the 14th of June, 1873. There were not
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at the date of the testator's will or at the time of his death, any second cousins in existence, nor had any been afterwards born, but there were at the date of the will and at the time of his death eleven first cousins once removed, a number of first cousins twice removed, and some children of a second cousin, whose claim to come in under the inquiries directed by the decree had been disallowed by the Master of the Rolls in Chambers.

The question was whether, there being no persons answering the description of "second cousins," the testator's first cousins once removed and first cousins twice removed were entitled to share equally, or whether the next of kin of the testator were entitled.

*Fischer*, Q.C., and *W. S. Owen*, for the Plaintiff and others claiming as first cousins once removed :—

Where at the date of the will the class presumed to be known by the testator and properly described by him does not exist, then the testator must be taken to have misdescribed the class, and you must endeavour to find out to what particular class of legatees his description was intended to be applied. Now here, at the date of his will, the testator had no real second cousins, but he evidently contemplated some persons whom he spoke of as second cousins, and, there being no persons answering the primary description, first cousins once removed ought to be let in. Where there is no person exactly answering the particular description, you are at liberty to see if there is any such person coming near the description who can be taken to be the person intended to be referred to, though inaccurately described in the will: *In re Parker* (1). *Slade v. Fooks* (2) expressly decides that where there are no second cousins at the date of the will, first cousins once removed are entitled.

If the Court holds that first cousins once removed are entitled, then first cousins twice removed cannot take concurrently.

*Mackeson*, Q.C., and *Charles Browne*, for parties in the same interest.

(1) 15 Ch. D. 528; 17 Ch. D. 262.

(2) 9 Sim. 386.



*Millar*, Q.C., and *Cadman Jones*, appeared for parties claiming as first cousins twice removed, but did not argue the question.

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Ince, Q.C., and *Vernon Smith*, for the next of kin :—

The words “second cousins” mean second cousins. The term has a well-known definite meaning, it means persons having the same great-grandfather or great-grandmother. It is one of the first principles of construction that there should be no alteration in the proper sense of words without a context, and where there is no reference to any living persons whom the testator knew.

The Master of the Rolls, in *In re Parker* (1), when commenting on *Mayott v. Mayott* (2), makes these remarks (3): “Now anybody reading that will can see that the testator referred to some living persons whom he knew. He makes his bequest to his first and second cousins, including the married first and second cousins; and if at the date of the will he had no second cousins, he must have meant somebody else by ‘second cousins’; and that is the *ratio decidendi*, namely, that he could not have used the term ‘second cousins’ in its proper sense, but must have used it in its improper sense.” In this will there is no context, and no reference to anything to shew that the testator referred to living persons, why then should the plain meaning of the words in this will be altered? The gift, moreover, is not an immediate gift to the “second cousins”; it is a gift to a class after the death of a tenant for life. If there had been second cousins born after the testator’s death, they would clearly have taken. The fact that there were no “second cousins” will not alter the meaning of the term, and the meaning of the words must not be altered to fit the facts. There is quite sufficient in his will to limit the words to their true meaning. *Corporation of Bridgnorth v. Collins* (4) is in our favour. We submit that under the circumstances the next of kin are entitled.

[*Sherratt v. Mountford* (5), *Baldwin v. Rogers* (6), *Crook v. Whitley* (7), and *Jarman on Wills* (8), were also referred to.]

(1) 15 Ch. D. 528.

(2) 2 Bro. C. C. 125.

(3) 15 Ch. D. 531.

(4) 15 Sim. 538.

(5) Law Rep. 8 Ch. 928.

(6) 3 D. M. & G. 649.

(7) 7 D. M. & G. 490.

(8) 4th Ed. vol. ii. p. 158.

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CHITTY, J. *H. B. Howard*, for the trustees.

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CHITTY, J.:—

I do not want to hear you, Mr. *Fischer*, for the case has been so thoroughly argued, and it really turns upon the view of the law which has been thoroughly discussed in the recent case of *In re Parker* (1), and upon one or two of the older decisions which appear not to have been overruled by the Master of the Rolls, or by the Court of Appeal in *In re Parker*.

In this will the testator makes what I think I may fairly call an anxious provision for his second cousins. He has made gifts to them at least four times in the will, the first gift being a trust “to pay to each of my second cousins £100”; and then there comes a division of certain proceeds “among my said second cousins”; then another gift in a similar form “among my second cousins as aforesaid”; and a fourth in which the residue is so divided, with a declaration that if any of such second cousins should be dead leaving lawful issue the share which any such second cousin would have taken should go to such issue equally between them if more than one, and if only one, then to such only child.

Now the facts are, that at the date of the will the testator had no second cousins, nor had he any at his death: but he had no less than eleven first cousins once removed living at the date of his will. I think it is reasonable to hold in a case such as this that the testator when he used the term “second cousins” was pointing to certain individuals whom he knew, and who were the objects of his bounty. No doubt a difficulty does arise, and arises from the fact that this is a gift to a class; but as I read the judgment of the Master of the Rolls in *In re Parker* (2), there are these principles to be derived from it: First, that if you have the term “second cousins” in a will, the term “second cousins” is to be taken according to its strict legal meaning, so as to denote those who are related being descended from the same great-grandfather or great-grandmother. He states an exception where there is a context. I do not think it is necessary for me to read the various passages, but still, as I read the judgment, he states a

(1) 15 Ch. D. 528; 17 Ch. D. 262.

(2) 15 Ch. D. 528.

second exception, namely, where at the date of the will there are no persons who answer strictly the description of "second cousins." There are two passages; I will mention one at the bottom of page 532, where he says, "When a man had no real second cousins at the date of his will"—he uses the term real—"and evidently contemplated somebody whom he spoke of as a second cousin, first cousins once removed ought to be let in, there being no persons answering the primary description. Nothing is better settled in construction cases where there is no person or property exactly answering the particular description than this, that you are at liberty to see if there is any such person or property coming near the description, as, under the particular circumstances of the case, must be taken to be the person or property, as the case may be, intended to be referred to, though inaccurately described in the will; that is all *Mayott v. Mayott* (1) decides." Then at the end of the judgment he says (2), "Accordingly, I say you have no right to alter the well-defined legal meaning of a term unless there is something in the nature of a context which shews that it could not have been intended by the testator to have that meaning. Where you find that at the date of the will the class presumed to be known to the testator and aptly described does not exist, then you call in the principle to which I have already adverted, that he must have misdescribed the class, and you endeavour to find out to what particular class of legatees the description was intended to be applied." Now that latter passage seems to me to be sufficient to cover the case which is before me, and I do not understand that in that judgment, or in the judgment of the Court of Appeal, the case of *Slade v. Fooks* (3), decided by the Vice-Chancellor of *England*, has been overruled. In that case the gift was to the second cousins, and the Vice-Chancellor, in disposing of the case, said in words which are applicable to the present case, that the testator had only two generations of persons in her contemplation, namely, those whom she called her second cousins and the issue of such of them as were dead, and that it was very common for persons to call the children of their first cousins their "second cousins." I agree with that latter observa-

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(2) 15 Ch. D. 538.

(3) 9 Sim. 386.

CHITTY, J. tion. I think it is very common ; and therefore in my judgment
 1881 I have not to deal with a case in which the terms are strictly
 In re technical terms. I think the term "second cousins" may, on a
 BONNER, fair consideration of this will with reference to the facts as proved,
 DECEASED. be taken to denote cousins who are not exactly related according
 TUCKER to the legal description in the degree of second cousins ; and so
 v. I hold, and it follows from *Slade v. Fooks* (1), and rightly, that
 GOOD. the persons who take under this will are the first cousins once
 removed.

Solicitors: *Combe & Wainwright ; Surr, Gribble, & Bunton ;
 Lovell, Son, & Pitfield ; Pattison, Wigg, Gurney, & King.*

(1) 9 Sim. 386.

G. M.

HARPHAM v. SHACKLOCK.

[1879 H. 358.]

Solicitor—Constructive Trust—Solicitor receiving Money to invest on a Specified Security—Legal Estate—Tacking—Priority.

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The owner of a copyhold, which was subject to a mortgage by conditional surrender for £350, made by a former owner, instructed *S.*, his solicitor, to procure him, on the security of the property, a loan of £550, out of which the old mortgage was to be paid off. *S.*, in July, 1876, obtained the money from the Plaintiff, who was also his client. In July, 1877, *S.* took a security for £700 on the property in his own name, the mortgagee assigning the old mortgage debt, and the mortgagor covenanting to surrender. The old mortgagee was paid by a cheque drawn by *S.* on *B. & Co.*, his bankers. *S.*'s account was already overdrawn, but on the same day he applied to them for leave further to overdraw, which was granted on his depositing with them the security for £700, and the cheque when presented was honoured. *B. & Co.* had no notice of the Plaintiff's claim. Some time after this *S.* put his account in credit, but it shortly afterwards became again overdrawn. *S.* handed over some of the other muniments of title to the Plaintiff. The Plaintiff commenced his action to establish his right to rank as incumbrancer for £550 in priority to *B. & Co.* After this, *B. & Co.* procured the old mortgagee to be admitted under the old conditional surrender, and to surrender to them :—

Held, by *Malins*, V.C., that after the account of *S.* with *B. & Co.* had once been put in credit, their security must, as against other incumbrances on the property, be taken to have been discharged, and that the Plaintiff was entitled to priority over *B. & Co.*

B. & Co. appealed, asking for priority over the Plaintiff to the extent of the old mortgage which had been paid off with their money :—

Held, by the Court of Appeal, that *S.*, having received money from the Plaintiff for the purpose of being invested on a mortgage of specified property, and having taken a security on that property in his own name, was a trustee of that security for the Plaintiff to the extent of the money received from him, and that this equitable title must prevail against the deposit with *B. & Co.*, and that the £350 mortgage could not be set up against the Plaintiff :

Held, also, that *B. & Co.* did not acquire priority by having got the legal estate, for that an equitable incumbrancer cannot, after receiving notice of a prior incumbrance, obtain priority over it by getting in a legal estate from a bare trustee.

IN 1876, *David Padley* was entitled to certain copyhold property subject to a mortgage made by his father, dated the 24th of January, 1850, for securing £350 and interest to *William Peck*,

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since deceased. This mortgage was made in the common way by conditional surrender to *Peck* and his heirs, and no one had been admitted under the surrender. *William Peck*, jun., was the customary heir of *W. Peck*, and had also become entitled to the mortgage money.

In 1876, *Shacklock*, who was *David Padley's* solicitor, and also commonly acted as the Plaintiff's solicitor, was instructed by *Padley* to obtain for him on the security of the property a loan of £550, out of which the existing security was to be paid off. *Shacklock* applied to the Plaintiff to make the advance. The Plaintiff had the property surveyed, and, being satisfied with the security, agreed to make the advance. He accordingly paid to *Shacklock* £100 in March, 1876, and £450 on the 7th of July, 1876, for the above purpose. *Shacklock* deposed that he applied a considerable part of these sums in paying *D. Padley's* debts, but he did not pay off *Peck's* mortgage.

In November, 1876, *Padley* mortgaged the property to *Pritchard & Jones* for £150, subject to *Peck's* mortgage. *Pritchard & Jones* had no notice of the dealings with the Plaintiff.

By an indenture dated the 24th of July, 1877, made between *W. Peck*, jun., of the first part, *Padley* of the second part, and *Shacklock* of the third part, in consideration of £350 therein expressed to be paid to *Peck* by *Shacklock*, and of a like sum expressed to be paid to *Padley* by *Shacklock*, *Peck* assigned to *Shacklock* the £350 secured by the mortgage of January, 1850, and *Padley* covenanted to surrender the copyholds to *Shacklock*, subject to a condition for vacating the surrender on payment of £700 and interest.

On the occasion of this deed being executed by *Peck*, *Shacklock* gave to him a cheque on *Shacklock's* account with his bankers, *Beckett & Co.*, for £418 10s., being the amount due to him for principal, interest, and costs; and the deed and the muniments of title in *Peck's* hands were handed over by *Peck* to *Shacklock*. *Shacklock's* account with *Beckett & Co.* was at this time overdrawn. *Shacklock* on the same day went to them, informed them that he had drawn the cheque, and asked to be allowed to overdraw further on giving security. This was acceded to, and he accordingly deposited with them the deed of the 24th of July, 1877,

and the other documents received from *Peck*, and the cheque when presented on the following day was paid. *Shacklock* about the same time handed over the other muniments of title to the Plaintiff, except one which had been handed over in 1876.

The Plaintiff commenced this action in July, 1879, against *Shacklock, Beckett, & Co.*, and *Pritchard & Jones*, alleging that *Shacklock* was a trustee for the Plaintiff of £550 and interest, part of the £700 and interest secured by the security of the 24th of July, 1877, and asking to have it declared that the Plaintiff was mortgagee for £550 and interest in priority to *Beckett & Co.* and *Pritchard & Jones*, and for foreclosure and other consequential relief.

On the 15th of December, 1879, *Peck* was admitted to the copyholds under the conditional surrender of 1850, and surrendered them to *Beckett & Co.*, who were admitted.

The cause came on to be heard before Vice-Chancellor *Malins* on the 9th of November, 1880.

Bristowe, Q.C., and *Simmonds*, for the Plaintiff:—

Shacklock received the Plaintiff's £550 for the purpose of investing it on the security of *Padley's* property. Having obtained a mortgage of that property to himself, he was a trustee of that mortgage for the Plaintiff to the extent of £550, and this prior equity cannot be displaced by the deposit security to the bankers. *Bradley v. Riches* (1) is very similar.

Cave v. Cave (2) is to the same effect. *Cory v. Eyre* (3) shews the principle. The equitable title of the *cestui que trust* cannot be displaced by an equitable charge made in breach of trust: *Shropshire Union Railway and Canal Company v. Reg.* (4).

J. Pearson, Q.C., and *Cadman Jones*, for *Pritchard & Jones*.

Higgins, Q.C., and *Langworthy*, for *Beckett & Co.*:—

Bradley v. Riches and *Cory v. Eyre* do not apply. In those cases there was a complete trust, not a mere constructive trust. *Shacklock* never was an express trustee for anybody. *Peck* was paid off

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(1) 9 Ch. D. 189.

(2) 15 Ch. D. 639.

(3) 1 D. J. & S. 149.

(4) Law Rep. 7 H. L. 496, 507.

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entirely with *Beckett & Co.*'s money, and if *Shacklock* is a trustee at all he is to that extent a trustee for *Beckett & Co.* The Plaintiff has no *jus ad rem*, but only a personal equity against *Shacklock*: *Phillips v. Phillips* (1). *Thorndike v. Hunt* (2) defeats the proposition of the Plaintiff that a trustee cannot give a good title by breach of trust. We rely on having advanced our money without notice of any prior claim, and having got in the legal estate. This gives us priority: *Pilcher v. Rawlins* (3); *Dart's Vendors and Purchasers* (4). *Shacklock* never was a trustee for the Plaintiff. If he had advanced the Plaintiff's money on this security he would have been, and so if he had advanced his own; but when he advanced the money of the bankers he became a trustee for them: *Hunter v. Walters* (5). When the cheque was presented *Shacklock's* account was overdrawn.

[The account being inspected, it appeared that on the 2nd of April, 1878, a large sum was paid in to *Shacklock's* account with *Beckett & Co.*, so that there was a considerable balance in his favour until the 25th of April, on which day a cheque for a large amount was paid, so as to make the account again overdrawn.]

MALINS, V.C., after stating the facts of the case, said:—

Where securities are merely equitable they in general rank in order of date, but a subsequent equitable incumbrancer who advanced his money without notice may gain priority by getting in the legal estate at any time before decree. Were it not for one circumstance, I should have thought it necessary to take time to consider whether the bankers had not thus gained priority. I am of opinion, however, that the bankers only agreed to make a temporary loan to *Shacklock* till his account was put into credit, and that the security was given with that view. Within a few months he put his account in credit, and as soon as that was done I am of opinion that as against other incumbrancers the security of the bankers must be deemed satisfied. It was their own folly to allow the account to be again overdrawn. The Plaintiff must

(1) 4 D. F. & J. 208. *Im 45. 145* (3) Law Rep. 7 Ch. 259.

(2) 3 De G. & J. 563. *Im 758/4* (4) 4th Ed. p. 755.

(5) Law Rep. 1 Ch. 75.

rank as first incumbrancer, *Pritchard & Jones* as second incumbrancers, and the bankers will come third. The bankers must pay the costs of the Plaintiff and of *Pritchard & Jones* up to the hearing.

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Beckett & Co. appealed, and by their notice of appeal asked that it might be declared that they were first incumbrancers to the extent of *Peck's* security, that the Plaintiff came second, *Pritchard & Jones* third, and *Beckett & Co.* fourth, as to the residue of what was due to them on the deposit of the mortgage of the 24th of July, 1877. The appeal was heard on the 18th of November, 1881.

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Higgins, Q.C., and *Langworthy*, for the Appellants :—

Peck was paid off with our money, and we ask to stand in his place. The Plaintiff had no mortgage on the estate, only a personal equity against *Shacklock*, which cannot prevail against the direct charge produced by the deposit of title deeds with *Beckett & Co.*

[JESSEL, M.R. :—The Plaintiff paid to his solicitor £550 for the purpose of being invested on a mortgage of this particular property, and the solicitor took a mortgage in his own name. Is he not a trustee?]

No; for the Plaintiff's money never went into the security.

[JESSEL, M.R. :—If the solicitor spent the Plaintiff's money and then invested his own money in this mortgage, is he any the less a trustee?]

Shacklock might be estopped as against the Plaintiff from denying the Plaintiff's title, but only by reason of a personal equity, and that cannot prevail against *Beckett & Co.*, with whose money the security was obtained. *Phillips v. Phillips* (1) is in our favour. Unless there is a declaration of trust, or the Plaintiff's money can be traced into the security, the equity of the depositor is better: *Thorndike v. Hunt* (2). *Middleton v. Pollock* (3) does not help the Plaintiff, for here no representation was made that the money had been invested. In *Cave v. Cave* (4) and *Bradley v. Riches* (5), which were relied on below, there was an express

(1) 4 D. F. & J. 208.

(2) 3 De G. & J. 563.

(3) 4 Ch. D. 49.

(4) 15 Ch. D. 639.

(5) 9 Ch. D. 189.

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trust. Here there was only a transaction of doubtful character. *Layard v. Maud* (3) supports our case. Then, moreover, we have the legal estate.

[JESSEL, M.R.:—How can you, after notice, get priority by taking a legal estate from a bare trustee?]

It has repeatedly been held that priority can be so obtained up to decree.

Macnaghten, Q.C., and *Simmonds*, for the Plaintiff, and
J. Pearson, Q.C., and *Cadman Jones*, for *Pritchard & Jones*,
 were not called on.

JESSEL, M.R.:—

The present appeal is against a decision of Vice-Chancellor *Malins* that the Plaintiff is entitled to take a charge upon the estate free from a prior incumbrance of £350.

The facts are very simple. *Padley* was owner of a copyhold estate, which had been mortgaged by his predecessor in title to one *Peck* for £350, and by derivation the mortgage had got into the hands of another *Peck*, so that *Peck* was mortgagee for £350 and interest. *Shacklock* was the solicitor of *Padley* and also the solicitor of *Harpham*, the Plaintiff in this suit. That being the position of matters, *Padley* was desirous of getting some more money on the estate, and he instructed *Shacklock* to raise sufficient money to pay off *Peck* and to procure a further advance of £200 for him, *Padley*. Accordingly *Shacklock* applies to his other client, the Plaintiff, to advance sufficient money to pay off *Peck* and to make a further advance of £200 to *Padley*—in other words, to advance £550 upon having a mortgage for that amount upon the copyhold estate. That being the position of matters, the Plaintiff agreed to advance the £550 for that purpose, and he paid the £550 in two sums to *Shacklock*, for the purpose of paying off the mortgage to *Peck* and advancing the balance to *Padley* on a mortgage of the copyhold estate for £550. I may mention that the Plaintiff took the precaution of having a valuation made of the estate. The first payment was made in March, 1876, and the second in July, 1876. Unfortunately, Mr. *Shacklock*, I suppose

being in difficulty, put some of the money in his pocket, and did not pay off the mortgage. That being the position of matters, *Shacklock*, nearly a year afterwards, took a transfer and further charge to himself for £700, paying off *Peck* by a cheque drawn on his account with *Beckett & Co.*, bankers, and the deed of transfer and further charge, and the muniments of title in *Peck's* possession, were handed to him. He then goes to *Beckett & Co.*, his account with whom was already overdrawn, tells them of the cheque, and asks to be allowed further to overdraw. This the bankers agreed to upon his depositing deeds with them, and he deposited with them, as security for his current account, the deed of transfer and further charge and the other documents which he had received from *Peck*, and handed to the Plaintiff the copies of Court Roll subsequent to the original mortgage to *Peck*. The muniments of title were thus divided between the bankers and the Plaintiff, and both of them, I suppose, thought that all was right. After that nothing further occurred, except that at a subsequent period, after the commencement of this action, the bankers got *Peck* to be admitted under the old mortgage surrender and to surrender to them, and having been admitted under that surrender they acquired the legal estate. Under those circumstances the Vice-Chancellor decided that the Plaintiff was entitled to priority over the bankers—in other words, that the bankers could not set up the £350 mortgage against the Plaintiff, and it appears to me that the Vice-Chancellor was quite right. *Shacklock* received from the Plaintiff the money to pay off *Peck's* mortgage, and afterwards paid it off, not with the Plaintiff's money, but with his own money, whether borrowed from the bankers or not is immaterial. How, then, could he set up the mortgage against the Plaintiff? Either he paid the Plaintiff's money as the Plaintiff's agent in pursuance of his agency, or he repaid that which he had abstracted from the Plaintiff by means of money borrowed from the bank. By no possibility could he say, as between himself and the Plaintiff, that he was entitled to the benefit of the charge for the purpose of paying off which he had received the money of the Plaintiff in a fiduciary character. Between himself and the Plaintiff the charge was non-existent on the estate—in other words, the Plaintiff's next charge was free from the £350, and *quoad* the 50 *Shacklock* had nothing he could pledge with the bankers.

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The bankers took nothing in equity *quoad* the £350, because as between *Shacklock* and the Plaintiff that charge was paid off. They had, in fact, no claim against anything except *Shacklock's* interest after payment of the Plaintiff's £550.

Then, as regards the legal estate, nothing is better settled than that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim. If *Peck* knew of the claim, it was a wilful breach of trust in him to surrender to the bankers; if he did not know of it, the bankers did, and knew that they were inducing him to commit a breach of trust by getting him to hand over the legal estate. The Appellant's case therefore fails, and the appeal must be dismissed with costs.

BAGGALLAY, L.J.:—

I am of the same opinion and have nothing to add, for this reason, that upon the undisputed facts of the case there were two incumbrancers each entitled to an equitable mortgage, that of the Plaintiffs being prior in point of time, and it is, in my opinion, clear that the subsequent getting in of the legal estate does not make any difference.

LUSH, L.J.:—

It would be presumptuous in me to differ from my learned colleagues on a question of this sort, but I own that if I had to reason out the matter I should have come to a different conclusion. The authority given to *Shacklock* was to pay off the £350 mortgage and to take a fresh mortgage for a larger sum. It strikes me there is a difference between the paying off and extinguishing a mortgage of this kind and the taking a transfer of it and keeping it alive. The duty of *Shacklock* was to pay off *Peck's* mortgage, but instead of that he took a formal transfer of it from *Peck*, and so, in my view, kept alive the original £350 mortgage, which was what the Plaintiff never intended to have. Therefore I feel great difficulty in seeing how he could be held a trustee for *Peck* of that mortgage. He was guilty of gross misconduct, but that is not the question here. Having the deed of transfer and further charge and other muniments of title in his own hands, he goes to the bank and raises money upon them. I own I should

have thought that the only remedy of the Plaintiff under these circumstances would be a penal application against the solicitor for his misconduct, because he violated his duty and appropriated the property to his own purposes. My learned brothers concur in quite a different view, and therefore all I can say is that I do not differ from them, it would be great presumption on my part if I did, but I must own that the equity in this matter is so refined that I am utterly unable to see it.

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Higgins, Q.C.:—

I ask the Court to vary the order as to costs. It is quite without precedent that in a priority suit we should be ordered to pay the costs of all the parties. No case of misconduct is alleged, and the Vice-Chancellor seems to have ordered us to pay the costs because we were better able to pay them than the other parties.

JESSEL, M.R.:—

I look upon the order with some surprise. It is certainly the general rule that in a priority suit the costs follow the mortgages, but the Court has a discretion, and can order one or other of the claimants to pay the costs if a case is made for it. If we were to vary the order of the Court below as to costs when an appeal on the merits fails, we should practically be allowing an appeal for costs only, and appeals would be brought nominally on the merits, but really only for the purpose of varying the order as to costs. I do not think that such is the case here, for I believe this to be a *bonâ fide* appeal on the merits; but we ought not to depart from the general rule.

BAGGALLAY, L.J.:—

I also have no doubt about the *bonâ fide* character of this appeal, but we must follow the rule that there shall be no appeal upon the question of costs only.

Solicitors for Plaintiff: *Richard Smith & Wilmer.*

Solicitor for *Pritchard & Jones*: *W. F. Watson.*

Solicitors for *Beckett & Co.*: *Paterson, Snow, & Bloxam.*

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Ex parte STREETER. *In re* MORRIS.

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 Nov. 24.
 —

Interpleader Order in Bankruptcy—Practice—Right of Appeal—Rehearing—
 1 & 2 Will. 4, c. 58, s. 6—1 & 2 Vict. c. 45, s. 2—*Common Law Procedure*
Act, 1860 (23 & 24 Vict. c. 126), ss. 14, 17—*Bankruptcy Act*, 1869 (32 & 33
 Vict. c. 71), ss. 65, 71—*Bankruptcy Rules*, 1870, r. 50—*Sheriff—Inter-*
pleader—Costs.

99BDNB
 33CLD649
 Any order in interpleader made by the Chief Judge in Bankruptcy can be appealed from.

The proper mode for the sheriff to apply to the Court of Bankruptcy for an interpleader order under the Act 1 & 2 Will. 4, c. 58, is by motion, of which notice is served on the claimants, and on the hearing of the motion the Court can determine their rights, without first making an order that they attend and interplead.

A person against whom an order is made on his default in appearing may appeal from the order on its merits.

Dodds v. Shepherd (1) considered.

On the hearing of a motion by a sheriff in the Court of Bankruptcy for an interpleader order, one of the claimants was represented by the managing clerk of his solicitors, who was not himself a solicitor. The Registrar, supposing him to be a solicitor, allowed him to cross-examine the witnesses on the other side, but, when he discovered the mistake, he declined to hear him as an advocate, and decided against his client, and he afterwards refused an application by the client for a rehearing:—

Held, that the Registrar ought to have adjourned the case, to give the client an opportunity of being represented by counsel or a solicitor, and that the client was entitled to a rehearing.

The sheriff's costs of the appeal were ordered to be paid by the party who should ultimately be decided to be in the wrong.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 27th of November, 1880, *E. W. Streeter* presented a bankruptcy petition against *Samuel Morris*. On the 12th of January, 1881, *Morris* filed a liquidation petition, under which his creditors resolved to accept a composition of 2s. in the pound. *Streeter* proved his debt under this petition, and received the composition, and on the 28th of April, 1881, an order was made upon his application dismissing his bankruptcy petition, and directing that *Morris* should pay the taxed costs of it. The costs were taxed at £32 1s. 8d., and, the amount not having been paid, *Streeter*, on the

22nd of June, issued a writ of *fi. fa.* out of the Court of Bankruptcy against *Morris* for the amount, and lodged it with the Sheriff of *Middlesex* for execution. The sheriff seized some goods of *Morris* under the writ, and on the 24th of June notice was served on him by one *Ann Webster*, that she claimed the goods which he had seized under a bill of sale which *Morris* had executed in her favour on the 25th of May, 1876, to secure the sum of £75. The sheriff, on the 29th of June, served upon *Streeter* and *Ann Webster* a notice that, by special leave of the Court, the Court of Bankruptcy would be moved on the 1st of July that *Streeter* and *Ann Webster* should appear and state the nature and particulars of their respective claims to the goods which had been seized under the *fi. fa.*, and maintain or relinquish the same, and abide by such order as might be made, and that in the meantime all further proceedings might be stayed. This application was heard by the Registrar, acting as Chief Judge, on the 1st of July, 1881. The sheriff appeared by his solicitor, and *Ann Webster* was represented by counsel. *Streeter* was represented by a Mr. *Mason*, who was the managing clerk to his solicitors, but was not himself a solicitor. *Ann Webster* was examined, and *Mason* was allowed to cross-examine her, the Registrar supposing him to be a solicitor. Subsequently, however, when he was about to address the Court, the Registrar discovered that he was not a solicitor, and declined to hear him any further. The Registrar held that *Ann Webster* had made out her claim, and he made an order, which contained a recital that it was made upon hearing the sheriff's solicitor, and the counsel for *Ann Webster*, "and the said *E. W. Streeter* not being legally represented," and upon reading certain affidavits, and "upon hearing the evidence of the said *Ann Webster*" and others. And it was ordered that the sheriff should withdraw from possession of the goods, and that *Streeter* should pay the costs of *Ann Webster* and of the sheriff.

Streeter did not appeal from this order, but on the 15th of July, 1881, he gave notice to *Ann Webster* and the sheriff of an application to the Court of Bankruptcy to rehear the original application of the sheriff.

In support of this application an affidavit was made by *Mason*, in which he stated that on the hearing of the application on the

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1st of July he asked the Registrar for an adjournment to enable him to deal with the evidence in support of *Ann Webster's* claim, but that this was objected to by *Ann Webster's* counsel, who said that she was there, and that he could cross-examine her. The Registrar said that he could do so, and he then cross-examined her. *Mason* added that the Registrar subsequently asked him whether he was a solicitor, and, on his replying that he was not, declined to hear him as an advocate. An affidavit was made by *Ann Webster's* solicitor, in which he said that it was not until the Registrar had given his judgment that it was ascertained that *Mason* was not a solicitor. He also denied that *Mason* asked the Registrar in the first instance to adjourn the hearing. The Registrar dismissed the application for a rehearing. *Streeter* appealed.

A. G. M. *McIntyre* (*McIntyre*, Q.C., with him), for the Appellant :—

The Appellant could not appeal from the original order, because it purports to be made on his default in appearing: *Walker v. Budden* (1).

[JESSEL, M.R. :—That case does not shew that you cannot appeal on the merits because you did not appear on the original hearing. You are still entitled to appeal on the ground that the adverse claimant did not make out her title.

LUSH, L.J. :—The execution creditor was in possession. The claimant might be barred if she did not appear; not so the execution creditor.]

The Registrar ought to have followed the practice under sect. 6 of the *Interpleader Act* (1 & 2 Will. 4, c. 58). He ought to have called the parties before him by rule of Court to interplead, and not to have determined their rights upon a motion made by the sheriff. The jurisdiction of the Court of Bankruptcy in interpleader is derived only under sect. 65 of the *Bankruptcy Act*, 1869, which gives to the Chief Judge "all the powers, jurisdiction, and privileges possessed by any Judge of Her Majesty's Superior Courts of Common Law at *Westminster*, or by any Judge of her Majesty's High Court of Chancery": *Ex parte*

Sheriff of Middlesex (1). A summons in Chambers, which is the process adopted in the High Court, is the act of the Court; a notice of motion is an act of one of the parties. Under sect. 6 of the *Interpleader Act* the proceeding must commence by an act of the Court.

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[JESSEL, M.R.:—The Court of Bankruptcy is a Court of Equity, and a Court of Equity would always protect its own officer.

*Winslow*, Q.C., for the bill of sale holder:—

This notice of motion was served by the special leave of the Court.

LUSH, L.J.:—So long as the Court has the parties before it and calls them before it by its usual process, is not that sufficient?

JESSEL, M.R.:—In the Chancery Division the usual practice is to proceed by summons.]

That is an act of the Court, not of the parties.

[JESSEL, M.R.:—At first the jurisdiction was given to the Courts of Common Law. The Act 1 & 2 Vict. c. 45, s. 2, gave the jurisdiction to a single Judge, but it does not say how the jurisdiction is to be exercised. The Chief Judge in Bankruptcy has all the powers of the Superior Courts.]

Under Rule 50 of the Bankruptcy Rules, 1870, the Court of Bankruptcy has power to issue a rule *nisi*. A notice of motion merely suggests that the parties should appear; it is necessary that the Court should make a positive order that they do appear and interplead.

[JESSEL, M.R.:—Under rule 50 all applications to the Court of Bankruptcy are to be made by motion. You had better deal with the merits of your application.]

The Appellant has never had a proper opportunity of cross-examining the witnesses on the other side or of adducing rebutting evidence.

*Winslow*, Q.C., and *Doria*, for the bill of sale holder:—

There is no right of appeal from a summary order in inter-

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pleader, and the Appellant will not be allowed to obtain indirectly by way of rehearing that which he could not obtain directly by way of appeal.

[JESSEL, M.R.:—The order made on the rehearing may not be appealable, but still the Appellant may be entitled to have a rehearing by the Chief Judge.]

Under sect. 14 of the *Common Law Procedure Act*, 1860, the Judge could, in a case where so small an amount was in dispute, determine the merits of the claims in a summary manner, and sect. 17 provides that his decision shall be final and conclusive. And, notwithstanding sects. 19 and 50 of the *Judicature Act*, 1873, the effect of Order I., rule 2, is that such a decision is still unappealable: *Dodds v. Shepherd* (1).

9 QBD 567 [JESSEL, M.R.:—The *ratio decidendi* of that case appears to be inconsistent with that of the House of Lords in the subsequent case of *Garnett v. Bradley* (2). And, moreover, if *Dodds v. Shepherd* was rightly decided, the provision of sect. 20 of the *Appellate Jurisdiction Act* of 1876 (39 & 40 Vict. c. 59) would have been unnecessary.

9 QBD 57 *Frank Evans, amic. cur.*, said that since *Garnett v. Bradley* the Court of Appeal had in *Buse v. Roper* (3) followed *Dodds v. Shepherd*.

*McIntyre*:—Sect. 71 of the *Bankruptcy Act*, 1869, gives a right of appeal from any order of the Chief Judge, and repeals *pro tanto*, as regards the Court of Bankruptcy, the provisions of sect. 17 of the *Common Law Procedure Act*, 1860.]

Some limit must be placed on the generality of the words of sect. 71; the jurisdiction of the Superior Courts of Common Law which is by sect. 65 given to the Court of Bankruptcy must be exercised with the same limitations as in the Common Law Courts. In the same way it has been held that the general words of the *Bankruptcy Act* do not override those of the *Bills of Sale Act*: *Ex parte Attwater* (4). The jurisdiction of the Common Law Courts in interpleader was given by sect. 65 of the *Bankruptcy Act* to the Court

(1) 1 Ex. D. 75.

(2) 3 App. Cas. 944.

(3) 41 L. T. (N.S.) 457.

(4) 5 Ch. D. 27.

of Bankruptcy, subject to the same right of appeal which existed in those Courts.

At any rate the granting of a rehearing is a matter of discretion, and this Court will not interfere with the discretion of the Registrar.

*T. L. Wilkinson*, for the sheriff, asked for his costs of the appeal.

JESSEL, M.R. :—

I regret that I am compelled to arrive at the conclusion at which I have arrived, because in my opinion what has taken place in this case is contrary to the ordinary rules for the administration of justice in this country. The question in dispute arises between an execution creditor and a claimant under a bill of sale executed by the debtor. The amount of the execution creditor's debt is less than £50, and no doubt the decision of a Judge of the High Court in such a case would have been final. But, according to the ordinary practice, when an interpleader summons is taken out either claimant has an opportunity given to him of considering and answering the affidavits of the other claimant. And, besides this, it is not according to the ordinary course of procedure for the Court to decide a matter without hearing both sides. What occurred in the present case was this: the managing clerk of the Appellant's solicitor asked for an adjournment to enable him to meet the evidence of the other claimant. On her part, it is said that the clerk did not ask for the adjournment till after he had cross-examined her. This contradiction does not amount to much, but I have come to the conclusion that what *Mason* says is right, and that he did ask the Registrar for an adjournment in the first instance. I think that that application ought to have been granted. But it was not, and the hearing of the case was forced on in spite of *Mason*, and he then did that which he ought not to have done, he chose to act as an advocate in Court, a thing which, not being a solicitor, he had no right to do. When it was discovered, before the end of the case, that he was not a solicitor, the Registrar declined to hear him as an advocate. No fault can be found with the Registrar for doing that. But then the Registrar

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did that which was not right; he decided against the client without having heard him either personally or by an advocate. When the mistake which had been made was discovered, an opportunity ought to have been given to the Appellant of being heard either by himself or by counsel or a solicitor. In fact, the case was decided against him without his having been heard at all. This was a miscarriage. The question was then raised whether under these circumstances he was not entitled to have his case reheard by the Registrar. I think that he was. Upon the application for a rehearing an affidavit ought to have been made stating the facts fully, and the application ought then to have been dealt with on its merits. Objections to the bill of sale have been stated, which are entitled to proper consideration. I give no opinion upon them now, though I think there are several matters well deserving of investigation. I think that a rehearing ought to have been allowed, but I have no doubt that if *Mason* had told the Registrar in the first instance that he was only a managing clerk, instead of acting as an advocate, which he had no right to do, the Registrar would at once have adjourned the hearing.

It is said, however, that the original order was not subject to an appeal, and that the same result cannot be arrived at indirectly by means of a rehearing. The right of appeal in bankruptcy depends upon sects. 65 and 71 of the *Bankruptcy Act*, 1869. Sect. 65 gives in very general words to the Chief Judge in Bankruptcy "all the powers, jurisdiction, and privileges possessed by any Judge of Her Majesty's Superior Courts of Common Law at *Westminster*, or by any Judge of Her Majesty's High Court of Chancery," and sect. 71 says that "any order made by the Chief Judge in Bankruptcy, whether in respect of a matter brought before him on appeal or not, shall be subject to an appeal to the Court of Appeal in Chancery." These words are very plain, and it appears to me impossible, having regard to them, to accede to the argument that the same reasons which would apply to prevent an appeal from an order of a Judge of one of the Superior Courts would apply also to an appeal from an order of the Chief Judge in Bankruptcy. The Legislature may well have thought that the one was not at all the same thing as



the other, but that there were material differences between the two. They may have thought that the Chief Judge, who was to have an inferior salary, would not stand in the same position as a Judge of one of the Superior Courts. It happens, no doubt, that one of the Judges of the Court of Chancery is also Chief Judge, but that cannot affect the intention of the Legislature. But, even if there had been no such distinction, I should have come to the same conclusion. If the words of an Act are plain, and do not lead to any absurdity or inconsistency, we have no right to substitute any construction of our own for their plain meaning. I think, therefore, that we are bound to follow the words of sect. 71, and that an appeal lies. If this be so, the Appellant has clearly a right to a rehearing, and that is the more convenient course.

I wish to make one other observation. If it is objected that a managing clerk, who is not a solicitor, cannot act as an advocate in Court, I think it may equally be said that he cannot be treated as qualified to cross-examine a witness. Consequently, the Appellant has a right to an opportunity of employing a duly qualified person to cross-examine his opponent's witnesses. It by no means follows that the result of such a cross-examination would be the same as that of the first. There must be a rehearing before the Registrar, but we give no costs to either side. The sheriff's costs of the appeal must be paid by the person who is ultimately unsuccessful.

BAGGALLAY, L.J. :—

I entirely concur, and I do not wish to add anything.

LUSH, L.J. :—

I agree.

*A. G. M. McIntyre* :—It has not been the practice to give costs to the sheriff; he comes to the Court for his own protection: *Beswick v. Thomas* (1); *Bowdler v. Smith* (2); *Tilleard v. Cave* (3).

(1) 5 Dowl. 458.

(2) 1 Dowl. 417.

(3) 6 Bing. N. C. 251.

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Jessel, M.R.

C. A.      JESSEL, M.R.:—Costs are now in the discretion of the Court.  
 1881      Whichever side is in the wrong is to pay the sheriff's costs. No  
*Ex parte*      action must be brought against the sheriff in respect of the  
 STREETER.      seizure of the goods.

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Solicitors for Appellant: *Smiles & Co.*  
 Solicitor for bill of sale holder: *J. E. S. King.*  
 Solicitor for Sheriff: *W. Maynard.*

W. L. C.

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 V.-C. H.  
*Aug. 7.*  
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*Nov. 21.*

LLANOVER *v.* HOMFRAY.

[1870 L. 77.]

PHILLIPS *v.* LLANOVER.

[1871 P. 58.]

*Practice—Evidence de bene esse in old Suit.*

In 1815 some customary tenants of a manor filed their bill on behalf of themselves and all other the customary tenants to establish their right to work minerals under their tenements without the consent of the lord. A commission was taken out in the same year to examine certain old persons *de bene esse*, and they were examined. After this the suit abated, was revived, and answers were put in in 1819, after which nothing further was done. In 1871 a bill of the same nature was filed by customary tenants, who did not derive title under any of the persons named as plaintiffs in the suit of 1815.

*Held*, by *Hall*, V.C., and by the Court of Appeal, that the evidence taken *de bene esse* in the former suit was admissible on behalf of the Plaintiffs in the later suit, the issue in the two suits being the same, and there being privity of estate between the parties to the two suits respectively.

ON the 20th of March, 1815, *J. H. Moggridge* and three other persons, customary tenants of the manor of *Abercarne*, filed their bill on behalf of themselves and all other the customary tenants against *Benjamin Hall*, the lord of the manor, alleging that according to the ancient custom of the manor the customary tenants had always dug and worked the mines, and particularly mines of coal, under their respective tenements without any interference from the lord. The bill further alleged that *Hall* became proprietor of the manor in 1809, and had taken proceedings which were set out in the bill to induce various tenants of the manor to

*See Phillips v. Homfray 24 L. D. 439.*

accept licenses from him to work the mines, and had induced various tenants to submit to his demands. It further alleged that *Hall*, having thus obtained some apparent evidence of his right to the mines, claimed to be absolutely entitled to them. The bill prayed that it might be declared that, according to the ancient custom of the manor, the Plaintiffs and all other the customary tenants had at all times been and then were entitled to the mines, and particularly to the mines of coal under their respective customary tenements held of the manor, and to dig and work the said mines and coal at their own will and pleasure without the license of the lord, or any interruption from him, and that the said ancient custom might be established by the decree of the Court, and that the Plaintiffs and the other customary tenants might be quieted in their right and title to the mines and coal, and to dig, raise, and work the same.

On the 10th of May, 1815, the Master of the Rolls, on the petition of the Plaintiffs, in which it was stated that the persons therein named, being twelve in number, were very material witnesses for the Petitioners in this cause, and were of the ages therein mentioned, the youngest being of the age of sixty-seven, made an order that the Petitioners should be at liberty to examine them *de bene esse* as witnesses for the Petitioners, and should have a commission for that purpose. A commission, in which the Defendant joined, was accordingly issued, the witnesses were examined, but not cross-examined, and the depositions were transmitted to the proper office.

*Hall* put in his answer on the 28th of November, 1815, and died in 1817. In May, 1818, the Plaintiffs filed a bill of revivor and supplement against his devisees. The Defendants put in their answers in 1818 and 1819. No further step appeared to have been taken in the suit.

The bill in *Lady Llanover v. Homfray* was filed in 1870 by Lady Llanover and the surviving trustees of the will of *Benjamin Hall*, and it prayed that it might be declared that they were entitled, as lords of the manor of *Abercarne*, to the mines and minerals under the *Troed Rhiw Gwair* estate, parcel of that manor, and for relief in respect of the getting of minerals under that estate by the Defendants *S. Homfray*, *R. Fothergill*, and *W. Homfray*, and

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*W. H. Forman*, since deceased. *J. and J. Phillips*, two of the Defendants, were the owners of that estate, and had taken proceedings against the Defendants *Homfray* and others in respect of the working, and recovered damages which had not yet been paid : see *Phillips v. Homfray* (1); and a material question in the suit was whether these damages were to be paid to the Plaintiffs or to *J. and J. Phillips*.

In 1871 the said *J. and J. Phillips* filed their bill on behalf of themselves and all the customary tenants of the manor of *Abercarne* against Lady *Llanover* and the surviving heirs of *Benjamin Hall's* will. This bill was twice amended, and as re-amended it prayed that it might be declared that the Plaintiffs and the owners of all other customary tenants within the manor were entitled to the mines, &c., under their respective tenements, and to search for, win, dig, and get the same, and to cart and carry away the same to lands not holden of the manor, and to use, dispose of, and sell the same either off or on the manor without license of the lord or lady thereof; for an injunction to restrain the Defendants from interfering with the above rights; that the rights and title of the Plaintiffs and the other owners of customary tenements within the manor of and to the minerals might be established and granted by the decree of the Court; that the suit might be deemed to be a supplemental suit to *Moggridge v. Hall*, and that the Plaintiffs might have the same benefit of that suit and of the proceedings and evidence therein against the Defendants in the like manner as the Plaintiffs in that suit would have had the same against the Defendant thereto; that if necessary or proper this suit might be taken and deemed to be a cross-suit to *Lady Llanover v. Homfray*; and for costs and further relief.

The Messrs. *Phillips* did not derive title under any of the Plaintiffs in *Moggridge v. Hall*.

Replication was filed in *Lady Llanover v. Homfray* and *Phillips v. Lady Llanover* before the Judicature Acts came into operation, and after the evidence had been closed the *Phillipses* moved in the three suits for publication of the depositions which had been taken *de bene esse* in *Moggridge v. Hall*. Vice-Chancellor *Hall*, on the 11th of December, 1879, made an order for their



publication without prejudice to any objection that might be made at the hearing to their admissibility (1).

At the hearing, the question was raised whether these depositions were admissible in evidence on behalf of *J. and J. Phillips*.

The action came on to be heard before Vice-Chancellor *Hall* on the 16th of June, 1880.

*Kay*, Q.C., *Kekewich*, Q.C., and *Hornell*, for the Plaintiffs in *Llanover v. Homfray* :—

These depositions are not admissible. The suit was not one to perpetuate testimony, but a suit for relief. The evidence was only taken *de bene esse*, and under the old practice there could not be any efficient cross-examination. The suit was dropped, and it would be very unfair to allow that evidence to be used now when the chance has been lost of rebutting it by contemporaneous evidence. To allow evidence to be used after so many years by the device of praying that the suit of *Phillips v. Lady Llanover* may be taken as supplemental to this old suit, which had been deliberately abandoned, would be giving the Messrs. *Phillips* an advantage in point of evidence such as has never before been allowed. We cannot now be placed in the same position in which we should have been if the evidence had been regularly adduced in *Moggridge v. Hall* at the hearing. When a suit in which evidence is taken *de bene esse* is abandoned, the parties must be taken as admitting that the evidence is not to be used.

*Matthews*, Q.C., *Freeling*, and *A. T. Lawrence*, for *J. and J. Phillips* :—

There was no abandonment of the suit of *Moggridge v. Hall* in any sense material for the present purpose. It simply remained dormant. The evidence was taken between parties privy in estate to the present parties, and is admissible.

*Hastings*, Q.C., *Osler*, and *S. Green*, for *Homfray* and others.

Aug. 7. *HALL*, V.C. :—

I have considered the objections urged against the admission of the evidence taken *de bene esse* in *Moggridge v. Hall*, and am of

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opinion that it should be received. The lords of the manor are privies in estate to the person who was lord at the time when that evidence was given, and the *Phillipses* are privies in estate to the persons who were then litigating with the lord. In *Taylor* on Evidence (1) it is said: "If, in a dispute respecting lands, any fact comes distinctly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relate to other lands," for which he refers to the observations of *Alderson, B.*, in *Doe v. Foster* (2). The admissibility of the evidence does not, I think, depend on the present suit of the Messrs. *Phillips* being taken as supplemental to the suit of *Moggridge v. Hall*.

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A decree was made dismissing the bill in *Llanover v. Homfray* as against all the Defendants, except the Messrs. *Phillips*, with costs, and as against the Messrs. *Phillips* without costs, and declaring that the Messrs. *Phillips* and the other customary tenants of the manor were entitled to the mines and minerals under their respective tenements, and to search for, &c., the same without the license of the lord or lady thereof; and the Defendants in *Phillips v. Llanover* were ordered to pay the Plaintiffs their costs of that suit.

C. A. Lady *Llanover* and her trustees appealed. The appeal came on to be heard on the 21st of November, 1881.

*Davey, Q.C., Kekewich, Q.C., and Hornell*, for the Appellants.

*Matthews, Q.C., Maclean, and A. T. Lawrence*, for *J. and J. Phillips*; and

*Hastings, Q.C., Osler, and S. Green*, for *Homfray* and others, were not called upon.

JESSEL, M.R., after considering the early evidence in the case, and adverting to the proceedings of Mr. *Hall* in the early part of the present century, and his making arrangements with some of

(1) 6th Ed. sect. 436.

(2) 1 Ad. & E. 791.

the principal tenants for them to acknowledge his title and for him to grant them licenses to work minerals, proceeded as follows :—

Some of the tenants resisted and would not take licenses. Mr. *Hall* brought actions against some of them, who then compromised the actions and took licenses. But some of the other tenants in 1815 filed a bill of peace on behalf of themselves and all other the customary tenants of the manor, to have their right to work the minerals declared. That was the suit of *Moggridge v. Hall*, which went on very quietly until 1817, when it became abated. It was revived in 1818. Answers were put in in the year 1818 and 1819, and then it seems to have dropped, no further step of any kind having been taken in it. In that suit witnesses were in 1815 examined *de bene esse*, that is, the testimony of old persons was taken—testimony which would be admissible at the hearing only in case those persons were incapable of giving evidence when the regular time for entering into evidence arrived. The evidence was taken under a commission, in which the Defendant joined, and he therefore had an opportunity of cross-examining the Plaintiff's witnesses if he thought fit, or of adducing evidence of his own. He did not do either one or the other. It appears, therefore, that the lord of the manor had no old witnesses to produce, and did not think it worth while to cross-examine those of the Plaintiffs.

The question has been raised whether this evidence is admissible in the present suit. I must say I have no doubt whatever that it is. The suit of *Moggridge v. Hall* was a suit by persons who were privies in estate with the present tenants ; they were not, indeed, owners of the same estate, but as the suit was on behalf of all the tenants it included the then owners of the estate now belonging to the Messrs. *Phillips*, and on the other side there was a lord of the manor, who is now represented by the present lord of the manor. Therefore it was a suit between persons privy in estate to the parties in the present action. The issue in that suit was the same as that in the present action, and the evidence in one is therefore admissible in the other. Why should the evidence not be admissible ? The lord had an opportunity of cross-

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examining, and the evidence answers every condition of admissibility, the last condition being that the witnesses must be dead or not producible, which of course is the case now with these old witnesses. It is objected that the evidence would not have been admissible at the hearing of the original suit, and therefore cannot be used in any other suit. If the first of those propositions were an accurate statement of the law it does not appear to me that the second would follow from it, but it is not accurate. The evidence would have been admissible at the hearing if the witnesses were dead, and therefore why is it not admissible at the hearing of another cause when the witnesses are dead? The event has occurred which would have made the evidence admissible. I do not know when that cause would have come to a hearing in those days, but, looking at the ages of the witnesses and knowing the time which causes then took to get to a hearing, I think it most probable that they would all have been dead before the hearing of the cause. However that may be, it appears to me that the mere chance of the witnesses surviving that period is no more an objection to reading their evidence now than the chance of their surviving the present time. If the witnesses were now alive, of course their evidence could not be read, but they must be called. There is, in my opinion, no more objection to reading this evidence than there is in any other case where the witnesses have been called and are dead. If a witness gave evidence at the trial of an action, and a new trial was ordered, then if he were dead at the time of the new trial you would read his former evidence; but if he were alive you could not do so, but would have to call him again. It appears to me, therefore, that the evidence was properly admitted by the Vice-Chancellor.

[His Lordship then proceeded to examine the evidence in the action, and stated his conclusion to be that it fully established the title of the customary tenants to the rights they claimed.]

BAGGALLAY, L.J., delivered judgment to the same effect as the Master of the Rolls, in the course of which he made the following observations as to the evidence in *Moggridge v. Hall*:—

The suit of *Moggridge v. Hall* was instituted in 1815, and was

similar in character to the suit of *Phillips v. Lady Llanover*. Answers were put in, and the evidence of old witnesses was taken *de bene esse*. The tenants appear at that time not to have thought it necessary to go on with the proceedings, and after 1819 no further step was taken in it, but the evidence which had been taken *de bene esse* remained in the archives appointed for the safe custody of such documents. That evidence has now been brought forward in this suit. I do not go over again what the Master of the Rolls has said, but only say that I feel quite clear that it is admissible upon the present hearing. It does not stand in quite the same position as that in the earlier suit of *Morgan v. Burgh*, for in that suit the then Plaintiffs and Defendant were the predecessors in title of the present Plaintiffs and Defendant respectively, but as the evidence was taken in a suit in which the Plaintiffs sued on behalf of all the customary tenants there is sufficient privity to make the evidence admissible.

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LUSH, L.J., concurred in giving judgment in favour of the right of the customary tenants, but did not particularly advert to the question of the admissibility of the evidence in *Moggridge v. Hall*.

H. Matthews, Q.C.:—I submit that the judgment ought to be varied as to costs. The bill in *Llanover v. Homfray* is dismissed without costs as against the Messrs. *Phillips*, and with costs as against the other Defendants. No reason is given for this, and the result is that Messrs. *Homfray*, who were wrongdoers, get costs, and the Messrs. *Phillips*, who were entirely in the right, do not get them. Probably it is a slip; the Vice-Chancellor may have intended that the Messrs. *Homfray* should not have costs.

JESSEL, M.R.:—I do not understand it. It is the case of a legal right, and the Messrs. *Phillips* have succeeded.

BAGGALLAY, L.J.:—You could not appeal for costs. Can we do for you what you could not obtain by an appeal of your own?

H. Matthews:—The whole case is before the Court, and the

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Court can do what is right. There is not a suggestion that the Messrs. *Phillips* had in any way misconducted themselves. The terms of Order LVIII., rule 5, are wide enough to enable the Court to do justice.

Davey, Q.C., for Lady *Llanover* :—

I was not in the Court below, and cannot give any reason for the Vice-Chancellor's decision, but the costs are in the discretion of the Court, and the Vice-Chancellor gave a well-considered written judgment. Order LVIII., rule 5, can only enable the Court to vary the decree in a matter which is the proper subject of appeal.

JESSEL, M.R. :—

We must assume that the Vice-Chancellor had some reason for not giving costs to the Messrs. *Phillips*. He may have thought their pleadings too long or their evidence excessive. They might have applied for leave to appeal as to costs, and if the direction is a slip the Vice-Chancellor has power to rectify it. We cannot vary the judgment in this respect.

BAGGALLAY and LUSH, L.JJ., concurred.

Solicitors for Lady *Llanover* : *Freshfields & Williams*.

Solicitors for Messrs. *Phillips* : *Ullithorne, Currey, & Villiers*.

Solicitor for *Homfray* and others : *T. W. Denby*.

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MARSHALL v. BERRIDGE.

[1880 M. 2442.]

Statute of Frauds—Agreement to grant a Lease—Specific Performance—Ambiguous Contract.

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An executory agreement for a lease does not satisfy the *Statute of Frauds*, unless it can be collected from it on what day the term is to begin, and there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion.

Jaques v. Millar (1) overruled.

The Plaintiff offered to take a lease of furnaces from the Defendant, conditionally upon his being able to make arrangements with other persons as to ore. A loosely-drawn memorandum was shortly afterwards signed by the parties, substituting certain other rents for the rents mentioned in the letter, which in other respects was to form the basis of the agreement. The Defendant, understanding that the lease was to begin immediately, offered possession to the Plaintiff at once, but the Plaintiff refused to take it as he had not yet made arrangements for ores, and continued to treat the agreement as conditional on his making those arrangements. Ultimately the parties differed as to the covenants to be inserted in the lease, and the Plaintiff commenced his action for specific performance:—

Held, that although where an agreement is clear the Court must act upon its own view of the construction without regard to the view entertained by the parties, yet where a party has throughout insisted on one construction of an obscure agreement, he cannot get specific performance on the footing of the opposite construction.

THIS was an action for specific performance of an alleged agreement by the Defendant to grant a lease to the Plaintiff of certain furnaces, &c.

After some previous correspondence the Plaintiff wrote to the Defendant on the 15th of June, 1880, a letter, the material parts of which were as follows:—

“I am prepared to take the works in their present state on the following terms:—Lease, three, five, seven, fourteen, twenty-one years, optional on my part only to give up at any one of the dates by giving six months’ notice. Rent, £400 per annum for all as it stands, to include everything on and about the property belonging to you, including furnaces, cottages, manager’s house, and all

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surface required for the use of the works and used by you and others when the furnaces were at work. That I have six months from date of agreement free from rents and royalties to enable me to do the work I require and start the furnaces. That I take any agreement you have with the Duke of *Somerset* (if binding on you) on the same terms you have it, but I should prefer to be left free to get other ores, which I find can be obtained at lower prices. *This offer is subject to my being able to make satisfactory arrangements for other ironstone adjoining, some of which I have been offered, and other of which I have no doubt of being able to get.*"

After some further correspondence the following memorandum was signed by both parties:—

"Reform Club, Pall Mall, S.W., 29 June, 1880.

"Seend Furnaces, &c.

"Rent of furnaces to be £400 per annum. Of ironstone royalty to be £500 per annum certain, and in respect of this an equivalent quantity of ironstone at the following rates per ton of 20 cwt. to be worked."

[Here followed a table of rates per ton, varying according to the selling price of pig-iron.]

"The above rents to be paid upon all worked in excess of quantity required to make up certain rent of £500. The above rents to be substituted for the rents, &c., specified in Mr. *Marshall's* letter of 15 June to Mr. *Berridge*, which in other respects is to be basis of agreement. The rent of furnaces to include manager's house and cottages as well as furnaces and land heretofore held and used for the use thereof, but does not include the agricultural land of the lessor. A lease and counterpart containing all usual stipulations to be prepared and executed."

On the 12th of July, 1880, the Plaintiff wrote to the Defendant as follows:—"There seems to be every prospect of my being able to get some adjoining ore on satisfactory terms, and shall therefore be obliged if you will let me have draft agreement that I may get early possession, so as to do what work I require while the weather is favourable. The law part is generally slow, and may cause some little delay."

The Defendant replied to this letter by a letter in which he

insisted that it was understood between the parties on the 29th of June that the ores to be used in the furnaces were to be taken from the Defendant. The Plaintiff answered that there was no such understanding, and insisted on the right to get ore from any quarter. Afterwards, on the 22nd of July, 1880, he wrote to the Defendant: "I wrote to you on the 12th inst. asking for draft agreement which I have not yet received. If your solicitors are likely to be much longer before sending it I must ask you to give me possession at once as there is a great deal of work to be done, particularly masonry, which cannot be done in winter, and will cause a great loss if not proceeded with at once. Please, therefore, send me authority, so that I may take possession at once." The Defendant replied: "I shall be happy to facilitate your having possession of the works, but we must have agreement first completed. I would not have entertained any application to hire the works unless substantially the ore was taken of or through me. The memorandum we arrived at was made by you and Mr. *Dodds*, and I am willing he should settle any open point. I understand Mr. *Dodds* will be in *London* next Tuesday; will you meet him and me at *Reform Club* on that day to finally settle agreement?" The Plaintiff wrote in answer that there were no open points, and that it was ready for the solicitors to complete the lease.

In the early part of September a draft lease was sent containing a covenant by the lessee not to buy, receive, or use upon the premises any ironstone or iron ore other than what he should have received from the lessor. This was objected to by the Plaintiff, and the parties being unable to agree the present action was commenced.

By paragraph 4 of the statement of claim it was alleged that, "Upon the signature of the hereinbefore stated agreement of the 29th of June, 1880, the Defendant offered the Plaintiff immediate possession of the premises comprised therein, but the Plaintiff then declined to accept such possession until he had had an opportunity of ascertaining for certain that he could make the 'satisfactory arrangement' referred to in the latter part of his letter of the 15th of June, 1880. For some little time, that is to say, for about a fortnight after the execution of the agreement of the

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29th of June, 1880, the Plaintiff delayed asking for or accepting possession of the premises comprised in such agreement, being in the meantime occupied in negotiations for adjoining ores on favourable terms, in which negotiations he succeeded, and, by letter dated the 12th of July, 1880, sent to and duly received by the Defendant, the Plaintiff expressed his desire to get early possession of the premises comprised in the agreement so as to do what work he required while the weather was favourable, and asked the Defendant to let him have the draft lease." The Plaintiff claimed specific performance and damages.

The Defendant by his statement of defence did not admit that any agreement was come to between him and the Plaintiff for a lease, and alleged that if there was there was no memorandum thereof in writing to satisfy the *Statute of Frauds*, the benefit of which statute the Defendant claimed. The Defendant denied having offered the Plaintiff possession of the premises on the signature of the memorandum of the 29th of June, 1880, or at any other time.

The case was heard before Mr. Justice *Fry*. The argument principally turned upon the insertion of the covenant to take ores from the Defendant, and on some questions as to the property comprised in the agreement which do not present any point calling for a report. The objection that no time was fixed for the commencement of the lease was taken, but not pressed in consequence of the decision in *Jaques v. Millar* (1), and judgment for specific performance was given. The Defendant appealed.

Fischer, Q.C., *Davey*, Q.C., and *Northmore Lawrence*, for the Appellant:—

The letter of the 15th of June and the memorandum of the 29th of June taken together do not constitute an agreement which satisfies the *Statute of Frauds*, for they do not shew from what time the lease was to commence. This letter is incorporated in the memorandum and forms the basis of it, and is conditional on the Plaintiff being able to make satisfactory arrangements. On the 12th of July the Plaintiff treats the agreement as still unconcluded. If it was a clear binding agreement it would not be

(1) 6 Ch. D. 153.

material that the Plaintiff did not understand it to be so; but if it is uncertain, the Plaintiff, after having so long contended that possession was not to be taken from the date, cannot turn round and obtain specific performance on the footing that it was an agreement for an immediate lease. The fact that the agreement does not specify the time of commencement is fatal to the Plaintiff's case. This point is not adverted to in the judgment of Mr. Justice *Fry*, and was not much pressed in argument, being treated as concluded by *Jaques v. Millar* (1), in which his Lordship had decided that an agreement for a lease, not mentioning the date of commencement, is an agreement for a lease to commence from the date of the agreement. We ask the Court of Appeal to overrule that decision. It is supported by no authority. The passages in *Co. Litt.* (2) and *Doe v. Benjamin* (3) refer to actual demises, and we do not dispute that an actual demise, in present words, not saying from when, is a demise from the date of the instrument, but that has no bearing on the case of an executory agreement for a lease. *Blore v. Sutton* (4) is directly contrary to *Jaques v. Millar*. Here the preparation of a lease is contemplated, and the term would begin on the execution of the lease, not on the date of the agreement. Even if *Jaques v. Millar* were right it would be distinguishable from this case, for there was no reference there to the preparation of a future lease; and the document was one which would, before the passing of 8 & 9 Vict. c. 106, have been an immediate demise.

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Cookson, Q.C., and *Archibald Brown*, for the Respondent:—

We do not say as a proposition of law that if no time for the commencement of a lease is mentioned in an agreement the lease is to commence from the date of the agreement, but we say that it is not necessary that the agreement should specify the time of commencement in so many words if the time can be collected from the agreement. We say that here it can be collected from its terms that the lease was to run from the time of the memorandum of the 29th of June, for it is stipulated that the Plaintiff shall have six months' possession rent free from the date of the agree-

(1) 6 Ch. D. 153.

(2) 46 b.

(3) 9 Ad. & E. 644.

(4) 3 Mer. 237.

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ment. The Appellant says that the word "agreement" means "lease," but there is no ground for that; "lease" and "agreement" are both mentioned in the letter of the 15th of June, and must be taken to have different meanings.

[BAGGALLAY, L.J.:—Do you say that the Plaintiff was to be put into possession at once?]

Yes.

[BAGGALLAY, L.J.:—The correspondence shews that the Plaintiff always insisted on a different view.

JESSEL, M.R.:—He was to have time to make satisfactory arrangements.]

It is a reasonable construction that the Plaintiff was to have possession six months' rent free from the date of the agreement, and the Plaintiff's letter and the memorandum of the 29th of June together fairly bear this construction. The case is thus taken out of the authority of *Blore v. Sutton* (1).

[JESSEL, M.R., here read from the record of *Blore v. Sutton*, which was brought into Court, and from which it appeared that the memorandum ran: "26 Oct. 1807. Plans of the ground, &c."]

The offer originally made by the Plaintiff was no doubt conditional, but we say that the memorandum of the 29th of June clearly dispensed with that condition.

[JESSEL, M.R.:—It may have done so; but how can you say it clearly did when your client shews that he throughout understood it the other way?]

If the terms of the memorandum are clear, it makes no difference that he misunderstood them.

[JESSEL, M.R.:—That no doubt is so; but it does not follow that if they are not clear he can persistently insist upon one view, and then turn round and obtain specific performance on the opposite view.]

We submit that the terms are clear.

JESSEL, M.R.:—

This is an appeal from a decision of Mr. Justice *Fry* granting

specific performance of an alleged agreement between the Plaintiff and the Defendant that the Defendant should grant the Plaintiff a lease of some furnaces, ironstone mines, &c. It appears to me from the judgment of the learned Judge, which I have read I hope with sufficient attention, that he did not consider many of the points which have been urged in argument before us. The principal point argued before us was, however, taken by Mr. *Fischer*, the leading counsel for the Defendant in the Court below, but was not pressed because it was considered to be covered by a previous decision of the same learned Judge, which accounts for the point not being noticed in the final judgment. That point is that it cannot be discovered within the four corners of the agreement from what time the lease is to begin. Of course if that is so the agreement cannot be enforced.

The view of Mr. Justice *Fry* was that because the agreement itself had a date, therefore that was the date from which the lease was to begin. I must say that not only is there no authority for such a proposition as a proposition of law, but there is a good deal of authority against it. Amongst other authorities is the case of *Blore v. Sutton* (1), decided by Sir *William Grant*, which is exactly in point, but which Mr. Justice *Fry*, in his previous decision in *Jaques v. Millar* (2), attempted to distinguish on the ground that it did not appear in the report of *Blore v. Sutton* that the date on which the memorandum of agreement was signed appeared on the memorandum itself. I must say, speaking with deference to the learned author of that observation, that I had come to an opposite conclusion on reading the report, but in order to be quite certain I sent for the record, and there it appears, as I expected, that the date was in the memorandum, and therefore that supposed distinction between *Jaques v. Millar* and *Blore v. Sutton* does not exist. But, independently of that, I am quite unable to concur in the decision in *Jaques v. Millar*. No doubt there is abundant authority for saying that if on a given day *A.* agrees to let and *B.* agrees to take a house, and that operates as a lease or present demise at law, then of course the words, being in the present tense, relate to the date of the instrument, and the term commences from that date. That is what is meant by *Doe v. Benjamin* (3) and that

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(1) 3 Mer. 237.

(2) 6 Ch. D. 153.

(3) 9 Ad. & E. 644.

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class of cases. It is equivalent to saying, "On this day I demise," and there is no such difficulty as there is in the case of an executory agreement to grant a lease. Where you have such an agreement, not only is it not to be supposed that the lease commences from the date of the agreement, but the very contrary is to be supposed. There is always something more to be done, for at all events there is the lease to be prepared. In *Jaques v. Millar* (1) the learned Judge says: "There is clearly no indication of the commencement of the term, except the date of the document; but it is equally clear that the agreement is couched in the present tense. There is no express postponement of the time at which the agreement is to come into operation: there is nothing to be done beforehand, no repairs and no stipulation as to the preparation of the lease by the lessor's solicitor, no condition precedent to the operation of the agreement." I should think that in every case where parties agree for a lease, say for thirty years, which by law must be an instrument of a solemn character and be carefully prepared, they contemplate its preparation as a condition precedent. But independently of that, in this case there is a provision, "a lease and counterpart containing all usual stipulations to be prepared and executed." Therefore if one desired to distinguish this case from *Jaques v. Millar* it could be distinguished by using the very argument used by the learned Judge in the Court below, but I prefer resting my decision on the general ground that the mere fact of there being a date in the agreement does not shew that it is the date of the lease, and that *Jaques v. Millar* cannot be sustained.

As I said before, the parties, when they enter into an agreement not operating as a present demise, intend a lease to be prepared which *primâ facie* will be dated on a subsequent day, and possession is not given by a prudent landlord until the lease is duly executed. On the one side it is not intended that the lessee shall have possession before the day when the lease is executed, nor, on the other, that the lessee is to pay rent without having possession. But then it is said that in this particular instance we can find within the four corners of the agreement itself a date for the beginning of the lease. I have been utterly unable to follow that

(1) 6 Ch. D. 153, 155.

argument. There is nothing in the memorandum of the 29th of June to give a date, and all that is said in the letter of the 15th of June is, "That I have six months from date of agreement free from rents and royalties to enable me to do the work I require and start the furnaces." It is suggested that the date of the agreement means the date of the memorandum. But the letter of the 15th of June, which is made the basis of the alleged agreement, says, "This offer is subject to my being able to make satisfactory arrangements for other ironstone." It is a conditional offer, and the memorandum does not appear to me to do away with the condition.

[His Lordship then entered into a consideration of difficulties which had arisen with regard to the Defendant's agreement with the Duke of *Somerset*, and gave his reasons for considering that the parties never were *ad idem* about the property to be included in the proposed lease.]

There is another observation which I have to make. The Plaintiff succeeded in the Court below by inducing the Court to put upon the memorandum an interpretation which he had always repudiated. Now it would be a very singular thing that a man who had always insisted on one construction of the agreement, and had refused to take possession because that was its proper construction, should then come to a Court of Equity insisting that the construction for which he had hitherto contended was wrong, and that the agreement had a totally different meaning, and should ask the Court to attach that meaning to it, and grant on that footing specific performance, the granting of which is in the discretion of the Court. I admit, indeed, that where an agreement is in writing and is unambiguous, it is the duty of the Court to construe it quite independently of the ideas of the parties as to what it means, but where an agreement is, as it is here, ambiguous, or capable of two constructions, I think it would be very strange indeed if a plaintiff, who had always acted on the one construction, should succeed in persuading the Court to grant specific performance on the footing that it ought to bear the opposite construction. The original letter contained this plain condition: "This offer is subject to my being able to make satisfactory arrangements for other ironstone adjoining, some of

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which I have been offered and other of which I have no doubt of being able to get." That was indisputably a condition precedent. When you come to the memorandum of the 29th of June, nothing is said in terms about that condition, but it is stated that the letter in other respects is to be basis of agreement, and then it is stipulated that a lease and counterpart are to be prepared. There are two readings of this memorandum. It may mean that the letter with the condition is to be the basis of the agreement, so that the agreement is conditional, or it may mean that the parties have come to an agreement and that the condition is waived. Now the Plaintiff, on his own shewing, meant to retain the condition, for he tells us that on the signature of the memorandum of the 29th of June, the Defendant, taking the second view, offered to give him possession, but the Plaintiff, taking the other view (and again, therefore, they are not *ad idem*), refused to take possession until he had had an opportunity of ascertaining whether he could make the satisfactory arrangements referred to in the latter part of his letter of the 15th of June. Then he says, in the 4th paragraph of the statement of claim, "The Plaintiff delayed asking for or accepting possession of the premises comprised in such agreement, being in the meantime occupied in negotiations for adjoining ores on favourable terms, in which negotiations he succeeded, and, by letter dated the 12th of July, 1880, sent to and duly received by the Defendant, the Plaintiff expressed his desire to get early possession of the premises comprised in the agreement, so as to do what work he required." That is most uncandid pleading, for anybody reading it would conclude that the Plaintiff, having succeeded in the negotiation, wrote a letter telling the Defendant that he had succeeded, and asking him for possession, on the ground that the condition had been complied with. But the letter of the 12th of July in fact amounts to this: "There is a prospect of my being able to make arrangements; let me have a draft agreement so that we may settle the terms, and then, in case I can get the adjoining property, we shall lose no time." It is not a demand for possession, but it is a request to have a draft agreement sent so that the law part may be settled, and no time be lost when he is ready to take possession. He, therefore, never did tell the Defendant that he

had made satisfactory arrangements and was ready to complete, nor did he ever treat the contract as a concluded one until they were quarrelling about the terms of the lease. It appears to me that if ever there was a case for refusing a plaintiff specific performance we have that case here; and on that ground, as well as the others I have mentioned, I think the decision of Mr. Justice *Fry* is unsustainable. The action must be dismissed with costs, and the Appellant will have the costs of the appeal.

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BAGGALLAY, L.J.:—

This is an action for specific performance of an alleged agreement to grant a lease. In my opinion no agreement in writing sufficient to satisfy the *Statute of Frauds* is established. I agree entirely with what has been said by the Master of the Rolls as to the parties not having been *ad idem* even as regards the subject-matter on which they were desirous of coming to an agreement. But, apart from that, the case is to my mind disposed of by the fact that no time is limited in writing for the commencement of the term. The case of *Blore v. Sutton* (1) is clear and distinct on the point. Sir *William Grant* there held that there was no sufficient agreement in writing “because the memorandum does not contain some of the material terms of a building lease, which this was. It merely specifies the rent and the number of years. It does not even specify the commencement of the lease.” There is very little substantial difference between the terms of the written document in that case and the terms of the document in this case, so far as those terms are clear. It is admitted that Mr. *Fischer* raised this point in the Court below, but Mr. Justice *Fry* considered it of slight moment and disposed of it in the course of the argument, and therefore we find no reference to it in the judgment. His ground for rejecting the argument was based on his own decision in *Jaques v. Millar* (2), where he had held under somewhat similar circumstances that if the memorandum of agreement bore a date the term agreed to be created was to commence from the date of the agreement. He was under the impression that in *Blore v. Sutton* the memorandum contained no date, and that therefore the principle he applied in *Jaques*

(1) 3 Mer. 237, 246.

(2) 6 Ch. D. 153.

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v. Millar (1) would not apply to that case. I should myself have come to the conclusion, on reading the report of *Blore v. Sutton* (2), that the date did appear on the memorandum, and on examining the bill it appears that such was the case. The supposed distinction, therefore, does not exist. The decision in *Jaques v. Millar* is then inconsistent with *Blore v. Sutton*, and I feel bound to say that I must dissent from the conclusion of Mr. Justice *Fry*.

Then it has been contended that the letter of the 15th of June and the memorandum of the 29th of June contain sufficient indication that the parties intended the lease to commence from the date of the agreement, whenever that agreement might be executed or come to. I am unable to find any such indication. I should infer from the documents that there was an intention that so soon as the Plaintiff should be able to ascertain that he could obtain mining rights on adjoining property, then an agreement should be entered into, but I can find nothing to shew that the parties intended the term to commence from the day when the final agreement should be signed.

The judgment of Mr. Justice *Fry* chiefly deals with a contention on the part of the Defendant that in the lease which was to be executed a covenant should be introduced prohibiting the Plaintiff from obtaining his minerals from any other source than the property held under the Duke of *Somerset*. I am not disposed at the present moment to differ from the view taken by Mr. Justice *Fry* on that point, if there had been an agreement between the parties. But, there being no agreement capable of being enforced in a Court of Equity, I am of opinion that the decision was wrong and must be reversed.

LUSH, L.J.:—

I also am of opinion that the agreement sought to be enforced is essentially defective on the ground stated by Mr. *Davey*, viz., that it does not define, nor can it be collected from it with reasonable certainty from what period the term is to commence.

The alleged agreement is for a lease for three, five, seven, fourteen, or twenty-one years. Now it is essential to the validity of a lease that it shall appear either in express terms or by refer-

(1) 6 Ch. D. 153.

(2) 3 Mer. 237.

ence to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the *Statute of Frauds*, contain those elements. Now I fail to see from the documents in this case how any one can tell from what period the lease was to commence. [His Lordship then considered at some length the letter of the 15th of June, and pointed out the impossibility of determining from it at what time the term was to commence, and further stated his reasons for considering that the parties never were *ad idem* as to what was the subject-matter of the intended lease, and concluded by stating his opinion to be that the agreement was essentially defective and could not be set up or sued upon either in law or equity.]

Davey, for the Appellant:—

The Plaintiff insisted on our bringing the draft lease into Chambers pending the appeal, and we have incurred costs. We ought to have those costs, and probably the dismissal of the action with costs, without more, will not carry them.

JESSEL, M.R.

No. You require a special order, and we make it.

Solicitors for Plaintiff: *Hacon & Turner*.

Solicitors for Defendant: *Hunters, Gwatkin, & Haynes*.

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Nov. 9, 11.

[1880 W. 3285.]

*Practice—Demurrer for want of Parties—Rules of Court, 1875, Order XXVIII.,
r. 1—Privity of Contract—Covenant running with Property.*

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Under the practice established by the Judicature Acts a demurrer for want of parties will not lie.

A patentee assigned letters patent to *A.* and *B.*, who covenanted with him that they, their executors, administrators, and assigns would use their best endeavours to introduce the invention by granting licenses or working the patent or selling it, and that the patentee should be entitled to receive £5 per cent. of all net profits, whether arising from royalties, sale, or otherwise, which should be received by *A.* and *B.* or the survivor of them, or the executors or administrators of the survivor, their or his assigns, and that an account of profits should be rendered yearly to the patentee, and his share of profits paid to him by *A.* and *B.* and the survivor of them, and the executors or administrators of such survivor, their or his assigns, with a proviso that after a sale had been made of the patent the interest of the patentee in the profits should cease, and a final account be come to. *A.* and *B.* had taken the assignment with a view to forming a company to work the patent. The company was formed and the patent made over to them. The patentee sued the company for an account of profits. The company demurred, on the ground that there was no privity between them and the Plaintiff, and that the Plaintiff's right, if any, was against *A.* and *B.* only:—

Held, by *Bacon, V.C.*, and by the Court of Appeal, that the Plaintiff could sue the company for an account of profits, for that the stipulations of the assignment to *A.* and *B.* amounted to a contract that the owners for the time being of the patent should account for and pay to the Plaintiff a share of profits unless a sale within the meaning of the deed was effected, and that no person taking the patent with notice of this contract could refuse to give effect to it.

THE statement of claim alleged to the following effect:—

That by an indenture dated the 24th of October, 1877, the Plaintiff, in consideration of £1000 paid to him by the Defendants *Denayrouze* and *Marcilhacy*, and of their covenants contained in the deed, assigned to them certain letters patent for electric lighting. By this indenture the assignees covenanted that they, "their executors, administrators, and assigns" would, so long as the same could be profitably worked, use their best endeavours to introduce the said electric lighting apparatus into use in *Great*

Britain and Ireland, &c., either by granting licenses or by working the letters patent by themselves or their agents, or by selling or otherwise disposing thereof to any responsible person or persons or company in their discretion; that the Plaintiff, his executors, administrators, or assigns should be entitled to receive £5 per cent. of all net profits, whether arising by means of royalties, sale, or otherwise, which should be derived by the above assignees "and the survivor of them, and the executors or administrators of such survivor, their or his assigns," from the said letters patent in *Great Britain*, &c., or from any improvements in the patent process which should be made or acquired by the said assignees or either of them or the survivor of them, or the executors or administrators of such survivor, their or his assigns, and which should be used in *Great Britain*, &c., after deducting from the profits to arise from such improvements all sums of money paid or incurred in connection therewith. The deed further provided that nothing therein contained should give, or be construed to give, the Plaintiff any right or interest in the profits to arise from the letters patent, or any such improvements as aforesaid, after a sale of the same should have been made by the said assignees, and after the final settlement referred to in the following clause, whereupon all the interest of the Plaintiff in the said letters patent, or any such improvements as aforesaid, should absolutely cease and determine. That an account should be rendered by the said assignees "and the survivor of them, and the executors or administrators of such survivor, their or his assigns," to the Plaintiff, his executors, administrators, and assigns, on the 1st of October in every year, of the net profits referred to in the last preceding clause for the preceding year, and the Plaintiff, his executors, administrators or assigns, or his or their agents, should be at liberty to compare every such account with the books of the said assignees "and the survivor of them, or the executors or administrators of such survivor, their or his assigns," which should relate thereto, and in which regular and correct entries should be made of all transactions relative to the letters patent and to any such improvements as aforesaid. That the share of the aforesaid profits payable to the Plaintiff, his executors, administrators, or assigns, should be paid to him or them by the said assignees,

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"their executors, administrators, or assigns," within one month after the time appointed for the delivery of every such yearly account. Provided that in the event of any sale of the letters patent by the said assignees, or the survivor of them, or the executors or administrators of such survivor, a final account and settlement should be forthwith taken and made between the parties of the purchase-money, or other consideration for such sale.

That by indenture, dated the 24th of October, 1877, the Plaintiff assigned to *A. Brogden* and *H. Brogden* one half of the net profits which should become payable to him by virtue of the preceding indenture.

That the assignment of the letters patent to *Denayrouze* and *Marcilhacy* was made to them with the intention that they should form a company for working the same, and that they accordingly promoted the formation of the Defendant company, which was ultimately incorporated on the 19th of March, 1878.

That by indenture dated the 7th of September, 1878, *Denayrouze* and *Marcilhacy* assigned the letters patent to the Defendant company, their successors and assigns, for their absolute benefit, in as ample and beneficial a manner to all intents and purposes as the assignors would have held the same if the now stating indenture had not been made.

That the last stated indenture was expressed to have been made in consideration of £10 paid by the company to the assignors, but that such sum was not in fact paid to them, and they were previously to the execution of that indenture merely trustees for the company, and the indenture was made for the purpose of transferring the legal right in the letters patent to the company. "The Defendants allege that the Defendants *Denayrouze* and *Marcilhacy* were not trustees of the said letters patent for the Defendant company. The Defendants allege, and it is the fact, that the indenture of the 7th of September, 1878, was prepared and executed as a formal deed for the purposes of registration in this country, and that the Defendant company gave to the Defendants *Denayrouze* and *Marcilhacy* very valuable consideration for such assignment, but the Defendants have not, nor has any of them previously to the commencement of this action, informed the

Plaintiff of the facts connected with the aforesaid assignment, and they have not, nor has any of them, accounted to the Plaintiff for his proportion of the true consideration for the said assignment nor paid him anything in respect thereof."

That the Defendant company used the letters patent in various places in *London*.

That the Plaintiff thereupon on the 8th of February, 1879, wrote to the Defendants *Denayrouze* and *Marcilhacy* on the subject.

That in reply to the Plaintiff's letter the Defendant company on the 28th of February, 1879, sent the Plaintiff the following letter:—

"With reference to your letter to Mr. *Marcilhacy* of 8th inst. on the subject of Mr. *Werderman's* patent for electric lighting apparatus, we beg to inform you that Mr. *Marcilhacy's* rights have been assigned by him to our company, and also to state that the provision contained in Mr. *Werderman's* assignment to Mr. *Denayrouze* and Mr. *Marcilhacy*, under which Mr. *Werderman* is entitled to receive £5 per cent. on all net profits (whether arising from royalties, sales, or otherwise), will be duly observed and performed by our company."

The statement of claim went on to allege that the Defendant company had neglected or refused to render any account to the Plaintiff, and to allege that the company had entered into negotiations therein more particularly mentioned for the sale of the letters patent together with other property to another company, without distinguishing the price for the letters patent.

The Plaintiff claimed to have it declared that the Defendant company were bound to deliver accounts to the Plaintiff as provided by the deed of the 24th of October, 1877, and to pay him a share of profits in accordance with the terms of that deed, and were bound by the covenants therein contained and entered into by *Denayrouze* and *Marcilhacy*—to have an order on the company for payment of what should be found due to him from them upon the delivery of proper accounts or upon taking of the accounts by the Court, or in the alternative that the Defendants might be ordered to pay the Plaintiff one moiety of £5 per cent. on the true consideration for the assignment of the 7th of September,

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C. A. 1878; to have an injunction restraining the proposed sale; and further relief.

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The company demurred on the grounds, 1. that there was no privity between the Plaintiff and the company, and that the Plaintiff's right (if any) to relief was against *Denayrouze* and *Marcilhacy* alone; 2. that the Plaintiff had no right to interfere with any sale by the company of the patents, and had no right to any part of the profits (if any) which had been made by the company; 3. that the Plaintiff claimed alternatively inconsistent relief; 4. that *A. Brogdon* and *H. Brogden* were necessary parties."

Vice-Chancellor *Bacon* overruled the demurrer. The company appealed. The appeal came to be heard on the 9th of November.

C. A. *Horton Smith*, Q.C., and *Grosvenor Woods*, for the Appellants, referred to *Powell v. Jewesbury* (1); Rules of Court, 1875, Order XXVIII., rule 1; *Bergmann v. Macmillan* (2); *Dent v. Turpin* (3); *Gorton v. Gregory* (4); *Spencer's Case* (5); and *Keppell v. Bailey* (6).

Higgins, Q.C., and *Jason Smith*, for the Plaintiff, were not called upon.

JESSEL, M.R.:—

The first point which it is necessary to decide is whether, under the practice established by the Judicature Acts, a defendant can demur for want of parties.

In the first place, it is to be observed that although the old practice is preserved in cases not provided for by the Rules, any practice inconsistent with the Rules is, of course, not preserved. Now Order XXVIII., rule 1, states that a party may demur to any pleading or to any part of a pleading setting up a distinct cause of action, &c., on the ground that the facts alleged therein do not shew any cause of action, &c. There is not a word there about parties, and there is no other rule which gives a right to demur at all. Consequently as far as the Rules go there is no power of de-

- (1) 9 Ch. D. 34.
- (2) 17 Ch. D. 423.
- (3) 2 J. & H. 139.

- (4) 3 B. & S. 90.
- (5) 5 Rep. 16 a.
- (6) 2 My. & K. 517.

murring for want of parties. That appears to me to be conclusive ; but I may add that the subject has not been forgotten, and that a different remedy is given where there is a defect of parties. There never was a demurrer at Common Law for want of parties, though you could in some cases plead in abatement, which was quite another remedy, and was the only remedy. Order XVI., rule 13, provides for the case of want of parties. "The Court or a Judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined, be struck out, and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added." So that the person who objects because of want of parties has nothing to do but to take out a summons (and it is a summons by no means uncommon, as I know) asking that certain persons may be added as necessary parties. It seems to me, therefore, that the proceeding by demurrer is no longer available, and that consequently the demurrer on this ground cannot be allowed.

The other point is one of substance. The Defendant company says that it, the company, is not liable, and that whoever is liable there is no liability attaching to the company, although the company is the assignee of the patent. The Plaintiff says, "I have an interest in the patent itself, whether my interest is that of a partner or whether my interest is that of a person entitled to a royalty or charge." The Defendant company says, "No, you have not, you have only the personal liability of Messrs. *Denayrouze* and *Marcilhacy*, and nothing else."

Now, when we come to look at the deed of the 24th of October, 1877, though I admit that it is not as well drawn as it might be, I think it is tolerably plain that the parties intended certain liabilities to attach to the patent itself. The Plaintiff was the patentee, Messrs. *Denayrouze* and *Marcilhacy* were, as we are told by the statement of claim, promoting a company to work the patent, and by the deed they give the patentee £1000 and 5 per

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cent. on the profits to be made by working the patent; and then there is a provision, which, as I read it, is that on a sale out and out there is to be an end of the arrangement as to profits, and the Plaintiff is to have 5 per cent. of the net purchase-money. Now if that is so, if the people owners for the time being of the patent are to work it, and are to pay 5 per cent. to the Plaintiff out of the profits, then, whether we treat it as a partnership, or whether we treat it as a charge on the patent, or whether we treat it as a royalty, it is quite plain that nobody could take the patent with notice of that arrangement, and say we will keep all the profits and will not be liable to account. What *Spencer's Case* (1) and *Keppell v. Bailey* (2) have to do with such a case as this I cannot see. It is a part of the bargain that the patent shall be worked in a particular way and the profits be disposed of in a particular way, and no one taking with notice of that bargain can avoid the liability.

Now that it is part of the bargain I think is plain really beyond controversy. The Plaintiff assigns the patent to *Denayrouze* and *Marcilhacy*, their executors, administrators, and assigns, and they covenant that they, "their executors, administrators, and assigns," shall endeavour to introduce the patent apparatus into use. Then the next provision is that the Plaintiff, his executors, administrators, and assigns, shall be entitled to receive 5 per cent. of all net profits derived by *Denayrouze* and *Marcilhacy*, "and the survivor of them, or the executors or administrators of such survivor, their or his assigns." Then it is provided that an account shall be rendered by *Denayrouze* and *Marcilhacy*, "and the survivor of them, and the executors or administrators of such survivor, their or his assigns," on the 1st of October in every year of the net profits, and the Plaintiff is to be at liberty to compare every such account with the books of *Denayrouze* and *Marcilhacy*, "and the survivor of them, and the executors or administrators of such survivor, their or his assigns;" and it is provided that the share of profits shall be paid to the Plaintiff, his executors, administrators, or assigns, by *Denayrouze* and *Marcilhacy*, "their executors, administrators, or assigns." It was clearly the meaning of the parties that as long as *Denayrouze* and *Marcilhacy* worked the

(1) 5 Rep. 16 a.

(2) 2 My. & K. 517.

patent they were to make out the account and pay over the share of profits. When their assigns worked the patent the assigns were to make out the account and pay; in other words, the arrangement between them was, that the owners of the patent for the time being should be bound to work it to the best advantage, to keep proper accounts, and to pay a share of the profits to the Plaintiff. How after that it can be argued in a Court of Equity that an assign can take the patent with notice of that arrangement and keep all the profits for himself, I am at a loss to understand. [His Lordship then adverted to the allegations shewing that *Denayrouze* and *Marcilhacy* had in fact entered into the agreement as trustees for a company about to be formed and had formed it, and thereupon became trustees for the company, as furnishing an additional reason why the Plaintiff should have a right to an account against the company, and referred to the letter of the 28th of February, 1879, as shewing that the company understood themselves to be liable to account to the Plaintiff.]

The only other point is this. The Plaintiff has amended, and he has made *Denayrouze* and *Marcilhacy* Defendants, and he alleges this, that that indenture of assignment was prepared and executed as a formal deed for the purpose of registration of this company, and that the Defendants gave the Defendants *Denayrouze* and *Marcilhacy* very valuable consideration for such assignment, and then the Plaintiff asks as alternative relief for payment of his share of that consideration. The company contend that this amounts to an allegation that there has been a sale under the terms of the agreement which put an end to the Plaintiff's right to profits. Now, in the first place, it is to be observed that, even if it were so, there would be a right to an account up to that time, but in my opinion it does not amount to any such statement. It is only an allegation that they received some valuable consideration. No one would maintain that every transaction for valuable consideration makes a sale. In one case the promise of a gentleman, that an elderly lady might when she came to town reside in his house for such period as she thought fit, was held to be a valuable consideration sufficient to prevent a conveyance being impeached under the statute 27 Eliz. c. 4, but could anybody say that the transaction amounted to a sale of the property? It

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is quite plain that the mere fact of there being valuable consideration will not make the transaction a sale. I will put another case to shew the absurdity of such a contention. Suppose that the company, as a memento of the transaction, presented to each of these gentlemen his portrait. That would be a valuable consideration, even if it were only a photograph not sent in a frame. Could anybody imagine that such a valuable consideration would make the transaction a sale of this patent? It is quite plain that the allegation in question cannot be tortured into an allegation of a sale out and out. It seems to me that the Vice-Chancellor was quite right in overruling this demurrer.

LUSH, L.J. :—

I am entirely of the same opinion. As regards the point of pleading, Order XXVIII., rule 1, defines the office of a demurrer and shews that it is a mode of challenging the validity of the opposite pleading in point of substance. There is, as has been already observed by the Master of the Rolls, a provision for adding parties who ought to be on the record and are not, but it is not the office of a demurrer to raise that question. It can only raise a matter of substance on the ground that the opposite pleading does not shew what it professes to shew—if it be a statement of claim, that it does not shew a good cause of action; if it be a statement of defence, that it does not shew any ground of defence; if it be a statement by way of reply, that it does not shew any substantial answer to the last pleading. Those are the only points which can be taken upon demurrer.

Then as to the substantial question between the parties, the substance of the agreement entered into between them appears to me to be plainly this: the Plaintiff assigned the patent to *Denayrouze* and *Marcilhacy*, subject to the payment to the Plaintiff of 5 per cent. upon the net profits which should be made from it in any way, either by working it, by granting licenses to others to work it, or by an absolute sale, which they had a power to make, and the word “assigns” is introduced in such a way as to shew that *Denayrouze* and *Marcilhacy* might, if they chose, assign over the patent, not by way of sale, but to any party to hold on the same terms as they held.

Then the 4th clause says that at that very time they took the patent with the intention of forming a company to work it, that they did promote the Defendant company, and it is afterwards stated that they became, therefore, trustees for that company.

Then comes the 5th paragraph, which it is contended by the company alleges that these two gentlemen, who were trustees for the company, effected, by the indenture of the 7th of September, 1878, an absolute sale to the company, so as to come within the provision putting an end to all claim of the Plaintiff to any royalty. Such a construction appears to me to be entirely contrary to the very terms of the indenture as described in the 5th paragraph. It appears here that *Denayrouze* and *Marcilhacy* assigned the letters patent to the company, "for their absolute benefit in as ample and beneficial a manner, and to all intents and purposes as they themselves might or could have held and enjoyed the same if the indenture now being stated had not been made." That is, having become trustees for the company, they transfer to their *cestui que trust* the interest which they had in the patent, so as to put the company in exactly the same position in which they themselves stood in relation to the Plaintiff. There is not a word there which imports a sale, and I have not the slightest doubt that this was not, and was not intended to be, an absolute sale, but that the company, who took from their trustees with full notice the patent, subject to the royalty, must be liable to the royalty until an absolute sale has been made.

LINDLEY, L.J. :—

I am of the same opinion. As regards the demurrer for want of parties, which was not mentioned in the Court below, but was mentioned here for the first time, a demurrer on the ground that the Messrs. *Brogden* are not parties would have been sustainable before the *Judicature Act*, but when we look at the Order which is in force relating to demurrers, and look also to the Order which is in force relating to misjoinder and nonjoinder of parties, it appears to me perfectly plain that the old practice of demurring for want of parties is at an end, and that the demurrer on that ground cannot be allowed.

Then as regards the other question, which is that the company

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is not liable to be sued by the Plaintiff in respect of what may be payable to him under the agreement, the matter stands in this way. It is said that the company is not a party to the agreement, and that the proper persons to be sued by the Plaintiff for the profits payable to him under the agreement are the two French gentlemen, parties to the contract, and not the company, which was not a party. In order to dispose of that argument we must look into the agreement, which seems to me to contemplate and to provide for two totally different things. First of all there is a provision that if the assignees of the patent sell it out and out the Plaintiff is to have nothing more to do with it. There is an end of it, except that there would have to be an account taken of the proceeds. Then the agreement provides for a method of assignment which does not amount to a sale. The word "assigns" occurs in clause after clause, and particularly the accounting clause gives the Plaintiff, which is somewhat unusual, a right to see the books of the assigns in order to see that he gets his proper share of the profits. Therefore some assignment of some sort is contemplated and provided for which is not a sale. If this patent has been sold, then, as I understand it, the Plaintiff is entitled to his share of the proceeds, but to nothing more. If it has been assigned not by way of sale, then he is entitled to a share of the profits. The question then arises whether this statement of claim shews a sale or an assignment which is not a sale. The assignment is stated to be made to the company in as ample and beneficial a manner, to all intents and purposes, as *Denayrouze* and *Marcilhacy* could have held it if the assignment had not been made. That shews clearly that the assignment to them is subject to the obligation to account to the Plaintiff for his royalty.

Still there remains the question, whether, even if that is so, the Plaintiff can sue the company. Mr. *Grosvenor Woods* has argued that he cannot, and cited *Spencer's Case* (1) and *Keppell v. Bailey* (2) as to covenants running with the land, but are those cases applicable to a case of this description? The agreement provides for assigns working the patent, for assigns accounting to the Plaintiff for the profits of the patent, for the Plaintiff seeing the books of the assigns, and it seems to me to be going a great

(1) 5 Rep. 16 a.

(2) 2 My. & K. 517.

deal too far to say that the Plaintiff cannot sue the company as an assign under the provisions of the deed. The case seems to me almost the same as the common case of persons on a dissolution of partnership assigning the assets charged with the payment of an annuity to the outgoing partner. In that case a purchaser of the assets with notice must take subject to the annuity. It seems to me the demurrer was rightly overruled.

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Solicitor for Plaintiff: *Weall*.

Solicitors for Company: *G. S. & H. Brandon*.

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[1880 P. 0227.]

Covenant—Beershop—Off License—Notice—Damages.

Upon the sale, in 1863, to *A.*, for the purposes of a public-house, of part of an estate intended to be laid out for building, the trustees of the estate covenanted with *A.*, his heirs and assigns, that they, their heirs and assigns, would not thereafter sell any portions of the estate without requiring the purchaser to enter into a covenant "not to erect thereon or use or permit to be used any building to be erected thereon as a tavern, public-house, or beershop."

Further portions of the estate were sold in 1870 by the then trustees to *G.*, who covenanted with the vendors not to use or permit to be used any building erected on the land and premises intended to be thereby assured as a tavern, public-house, or beershop. The rest of the estate was sold to other persons.

In 1879 *H.* purchased from *G.* part of the land comprised in *G.*'s purchase of 1870, and entered into a covenant with *G.*, in terms similar to those of the covenant in the deed of 1870.

I., a yearly tenant under *H.* of one of the houses, having obtained an "off license," sold under it beer which was not drunk upon the premises:—

Held, that the property was bound by the restrictive covenant entered into by the vendors in 1863, and that *B.*, an assign of *A.*, was entitled to an injunction and damages against *H.* and *I.*, in respect of the breach of covenant in selling beer under an "off license."

BY an indenture dated the 1st of July, 1863, a piece of land, part of the "*Great Star Field*" at *West Ham*, in *Essex*, was conveyed by Messrs. *Shanks* and *Leeds* (the trustees) and *E. C. S. Morgan* and *L. Hudson* (the persons beneficially interested) to *Abel Collins*, the predecessor in title of the Plaintiff *Nicoll*, for the purpose of erecting a public-house thereon. In accordance with a stipulation by *Collins*, the indenture contained a covenant by the trustees (for the purpose of binding their assigns at all time, but each of them so as to be personally binding on himself, his heirs, executors, and administrators, so long only as the piece of land called the "*Great Star*" or any part thereof should remain in his or their possession or power), with *Collins*, his heirs and assigns, that they, their heirs and assigns, would not thereafter sell or convey any portion or portions of the field called the "*Great Star*," without requiring the purchaser thereof to enter

into a covenant with the trustees not to erect thereon, or use or permit to be used any building to be erected thereon as a tavern, public-house, or beershop.

Abel Collins erected a public-house, the "*Alexandra Tavern*," on the land so conveyed to him.

By an indenture of the 15th of January, 1866, *Collins* demised the public-house unto the Plaintiff *Nicoll* for ninety-nine years, and the reversion in fee was afterwards conveyed by *Collins* unto one *Proudfoot*, who had since conveyed such reversion to the Plaintiff *Nicoll*, who was now sole and absolute owner of the reversion in fee. It appeared that the lease from *Collins* to *Nicoll*, for which *Nicoll* had paid £3000, did not contain any restrictive covenant by *Collins*; but *Nicoll*, who bought the property for the purpose of keeping a public-house, with the benefit of the restrictive covenant, stated in his evidence that he had thought and understood it was to be inserted, and that it was omitted by a mistake of the solicitor.

In 1869 other portions of the *Great Star* field were, by order of the Court, put up for sale by auction by Messrs. *Leeds* and *Hurman*, the then trustees, and the conditions of sale contained a condition that each of the purchasers should, by his conveyance, covenant with the vendors not to erect on the lot purchased by him, or use or permit to be used any building to be erected thereon as a tavern, public-house, or beershop.

By an indenture of the 31st of December, 1870, a portion of the *Great Star* field was conveyed by *Leeds* and *Hurman* (the trustees), and by *E. C. S. Morgan* and Mrs. *Hurman* (the persons beneficially interested), to the *Gaslight and Coke Company*, and after reciting the covenant contained in the conveyance to *Collins* of the 1st of July, 1863, this indenture contained a covenant by the company, for themselves and their assigns, with the trustees, that they, the company or their assigns, "will not at any time hereafter use or permit to be used any building erected on the piece of land and premises intended to be hereby assigned as a tavern, public-house, or beershop."

By other sales the whole estate had been realized before the commencement of the action.

In 1879 the Defendant *Evan Prosser* purchased from the Gas-

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light and Coke Company part of the land comprised in their purchase of the 31st of December, 1870, and by his statement of defence *Prosser* admitted that in his conveyance he entered into a covenant with the company "in terms similar to those of the covenant contained in the indenture of the 31st of December, 1870 ;" but there was no reference in this deed to either of the prior covenants. On one of the plots so conveyed to *Prosser*, a house, No. 5 *Harrington Terrace*, had been erected, which was in the occupation of the Defendant *Fenning* as tenant of *Prosser* under an agreement from year to year from the 25th of December, 1879, with a provision that he (*Fenning*) would not during the tenancy use the premises for any business other than and except for the sale of beer not to be drunk on the premises, and wine and spirits under a grocer's license, without *Prosser's* consent in writing. *Fenning* had recently obtained a wholesale beer-dealer's excise license, and also an excise retail license, for the sale of beer to be consumed off the premises.

The action was brought by *Nicoll* for the purpose of restraining *Fenning* and *Prosser* from using 5 *Harrington Terrace* as a public-house, tavern, or beershop, and from selling or permitting to be sold on the premises any wine, beer, or spirits for consumption either on or off the premises, and from in any way violating the covenant so entered into by *Prosser* and his vendors, and for damages.

When the case came before the Master of the Rolls (from whose Court it had been transferred), upon interlocutory motion for an injunction, on the 10th of August, 1880, his Lordship intimated that the covenant did not run with the land, and that for the action to succeed at the hearing, it would be necessary to add *Shanks* and *Leeds* as Plaintiffs, it being then assumed that they still continued to be the trustees.

No order was then made upon the motion, but the costs were to be costs in the action.

The statement of claim had since been amended by joining as Plaintiffs with the Plaintiff *Nicoll*, Messrs. *Leeds* and *Hurman*.

Higgins, Q.C., and *Whitehorne*, Q.C., for the Plaintiffs :—

In selling beer to be drunk off the premises *Fenning* has com-

mitted a breach of the covenant against the use of the premises as a public-house, tavern, or beershop: *Bishop of St. Albans v. Battersby* (1); *London and Suburban Land and Building Company v. Field* (2); the term beershop (where beer is sold to be consumed off the premises) being distinguished from beerhouse (where beer is sold to be consumed on the premises): *Holt & Co. v. Collyer* (3).

Then, assuming that there has been a breach of the covenant, the Plaintiff is entitled to enforce it. Where, as part of a general building arrangement, a restrictive covenant has been inserted for the benefit of all persons purchasing parts of the estate, that covenant affects the plots purchased and all persons taking with notice of that covenant. No question of covenant running with the land arises, but simply whether the Defendants, purchasing with express or constructive notice of the restrictive obligation, will not be restrained from a breach of it: *Mann v. Stephens* (4); *Western v. Macdermott* (5); *Harrison v. Good* (6). The Plaintiff *Nicoll*, as assign from *Collins*, has an interest sufficient to maintain the action: *Lord Mannors v. Johnson* (7); and any objection as to the trustees not being parties to the action has been removed by adding them as Plaintiffs: *Eastwood v. Lever* (8).

Prosser had notice of the covenant with *Collins*, and that the *Gaslight Company*, his vendors, had become bound by the covenant; and *Fenning*, as tenant from year to year, having constructive notice of his lessor's title, is in the same position as if he had distinct notice of the original covenant, and cannot say that, not having made inquiry, he is not bound by it: *Wilson v. Hart* (9); *Fielden v. Slater* (10); *Clements v. Welles* (11). The rule that a lessee is not relieved, by not making inquiry, from constructive notice of his lessor's title, has not been altered by the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), s. 2: *Patman v. Harland* (12).

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(1) 3 Q. B. D. 359.

(2) 16 Ch. D. 645.

(3) Ibid. 718.

(4) 15 Sim. 377.

(5) Law Rep. 1 Eq. 499; Ibid. 2 Ch.

(6) Law Rep. 11 Eq. 338.

(7) 1 Ch. D. 673, 681.

(8) 12 W. R. 195; 4 D. J. & S. 114.

(9) Law Rep. 1 Ch. 463, 468.

(10) Ibid. 7 Eq. 523.

(11) Ibid. 1 Eq. 200.

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Hemming, Q.C., and Stirling, for Prosser:—

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The only covenant which the Plaintiff *Nicoll* is entitled to enforce is the covenant by the trustees in the deed of July, 1863, that they would not sell without introducing into the purchase deed the particular restrictive covenant. The only cases in which a person other than the original covenantee can enforce a restrictive covenant are: 1. Where there is a general building plan affecting the whole property, supported by common mutual covenants, for the purpose of carrying out that scheme, mutuality as between Plaintiff and Defendant or those under whom they respectively claim being of the essence; 2. Where the person suing represents the original covenantee by devolution of title: *Keates v. Lyon* (1); *Whatman v. Gibson* (2); *Coles v. Sims* (3); *Child v. Douglas* (4); *Western v. Macdermott* (5). Here there are no mutual covenants to which *Nicoll* and the Defendants, or the persons through whom they claim, are parties for the benefit of the whole property, but only a covenant which was entered into by the trustees for the protection of *Collins's* monopoly, which, moreover, has not been broken. No doubt the *Gaslight Company* might sue *Prosser* on his covenant, and a proper plaintiff might restrain him on the covenant of the *Gaslight Company*, but as a mere outsider, in no way claiming under the *Gaslight Company*, *Nicoll* cannot sue for the purpose of enforcing either of these covenants. The addition of the new trustees as co-Plaintiffs does not improve his case. They have sold the land, and have no longer any interest in enforcing their covenant with the *Gaslight Company* at the instance of the Plaintiff, who has himself no interest as against the *Gaslight Company*. In order to give *Nicoll* and the other Plaintiffs any right of action, they must unite *damnum* and *injuria*, but in this case *Nicoll* shews no *injuria* and the other Plaintiffs shew no *damnum*.

Marten, Q.C. (Stirling with him), for Fenning:—

The cases cited as to the meaning of the term "beershop" do not apply, as they all turn upon the construction of the term in

(1) Law Rep. 4 Ch. 218.

(3) Kay, 56.

(2) 9 Sim. 196.

(4) Kay, 560.

(5) Law Rep. 2 Ch. 72.

deeds subsequent in date to the *Licensing Act*, 1863 (26 & 27 Vict. c. 33), which first created what is now called the "beershop," by introducing the "additional license" for the sale of beer in less quantities than four and a half gallons or two dozen quart bottles, "but not to be drunk on the premises where sold." The term, when used, as in this case, in a deed prior to that Act, cannot be extended by later decisions, but must be construed in the same manner as in *Jones v. Bone* (1); *Pease v. Coats* (2); viz., that the sale of beer to be consumed off the premises is not a breach of a covenant contained in a deed prior to August, 1863, not to use the particular building as a tavern, public-house, or beerhouse. But whether what has been done is a breach of the covenant or not, *Fenning* had no notice whatever, either express or constructive, of any general covenant affecting the whole estate. Nor is he bound by constructive notice, as all that would have been disclosed to *Fenning* in taking the premises from *Prosser* was that *Prosser* was bound by a covenant to the *Gaslight Company*, who acquired their title by private contract. The right to enforce that covenant, which is peculiar in wording, remained in the hands of the trustees, who merely have the power, but are not bound, to intervene in favour of *Collins* and his assigns, and as the whole of the property (except their interest in the roads and sewers) has been sold, the trustees have no longer any substantial interest in enforcing it, and have no equity to sue: *London and Suburban Land Company v. Dale* (M. R. 2nd April, 1881). Nor is *Nicoll* entitled to sue upon the original covenant entered into with *Collins*, as his conveyance from *Collins* contains no provision that he is to have the benefit of the restrictive covenant entered into by the trustees with *Collins* for his benefit, and not for the benefit of the particular property so as to pass to the assigns of *Collins*: *Renals v. Cowlishaw* (3); *Master v. Hansard* (4); *Kemp v. Bird* (5). Moreover, no special damage has been shewn to have resulted to *Nicoll* by our sale of beer as other beershops have been set up; and the Court, in granting or withholding an injunction in a case of this kind, will have regard to the general character and interests

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(1) Law Rep. 9 Eq. 674.

(3) 9 Ch. D. 125; 11 Ch. D. 866.

(2) Ibid. 2 Eq. 688.

(4) 4 Ch. D. 718, 721, 724.

(5) 5 Ch. D. 549, 974.

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Higgins, in reply:—

No difference was introduced by the *Licensing Act*, 1863. Before that Act, persons having a wholesale license might obtain a retail license: *Oke's Licensing Laws* (2). *Jones v. Bone* (3) does not apply, as the sale complained of in that case was by a grocer, of wine and beer in bottles. The word “beershop” has no technical meaning, but includes a beerhouse and also a shop where beer is sold to be consumed off the premises: *London and Suburban Land and Building Company v. Field* (4); *Bishop of St. Albans v. Battersby* (5).

On the question of damage and that the Plaintiff's trade has been seriously diminished, the evidence is conclusive. *Prosser* bought the property from the *Gaslight Company* with perfect knowledge that it was bound by a restrictive covenant, and it is immaterial whether *Fenning*, who is *Prosser's* tenant, had direct notice or knowledge of the covenant. He is equally bound by constructive notice, and cannot protect himself from an injunction by accepting the statements of *Prosser* and abstaining from making inquiry as to the instrument under which *Prosser* held: *Parker v. Whyte* (6); *Wilson v. Hart* (7); *Patman v. Harland* (8); *Clements v. Welles* (9). In matters of contract the intention of the parties is to be regarded when it can be carried into effect. Here it was the plain and manifest intention of the original owners of the estate, who entered into the covenant with *Collins*, that there should be only one public-house on the property, and *Nicoll*, who is entitled to the benefit of the restricting covenant, and has an interest in its performance, is entitled in equity to restrain the Defendants, not on the ground that the covenant runs with the land, but on the ground that they are dealing with the land inequitably: *Fairelough v. Marshall* (10).

(1) 2 My. & K. 552.

(2) 2nd Ed. p. 72.

(3) Law Rep. 9 Eq. 674.

(4) 16 Ch. D. 645.

(5) 3 Q. B. D. 359.

(6) 1 H. & M. 167.

(7) Law Rep. 1 Ch. 463.

(8) 17 Ch. D. 353.

(9) Law Rep. 1 Eq. 200.

(10) 4 Ex. D. 37.

BACON, V.C., after observing that a great deal of time had been occupied in the discussion of cases which really had not the most remote bearing upon the subject before him, said, that it was a plain principle of the Court of Equity that in matters of contract the intention of parties was to be regarded where it could be carried into effect. That could not be gainsaid. What was the position of these parties? The original owners of the *Great Star Field* building estate, of about twenty-five acres, granted to the Plaintiff's father-in-law, Mr. *Collins*, a building lease of one plot for the erection of a tavern or public-house upon it. The rest of the estate was to be sold likewise for building purposes, and it was the intention of the parties that but one public-house (as far as this case was concerned) should be erected on the estate. For that purpose a covenant was made between them. It had been argued that there was no mutuality in this case, but it was for the vendor's benefit not less than in the interest of the purchaser, *Collins*, that he should be protected against the possibility of half-a-dozen public-houses or similar establishments being built on the property. That fact at once disposed of the argument put forward on the question of mutuality; indeed the covenant was as much for the benefit of the future owners of the rest of the land as it was for *Collins*, the purchaser of the public-house plot, a small portion only. There was no evidence whether at that time contracts for sale had been made by the vendors with any other persons, but that was a matter of indifference. The bargain between them and *Collins* was that they, "their heirs and assigns, should not thereafter sell or convey any portion of the estate without requiring the purchaser to enter into a covenant with them not to allow any building to be erected thereon to be used as a public-house, tavern, or beer-shop." Every person to whom they afterwards sold was entitled to the benefit of that covenant; and it was as much for their benefit as for that of *Collins* and the vendors that the restrictive covenant was imposed upon them against interfering with, spoiling, or damaging the general property by establishing any other beerhouse or public-house upon it, one having been thought sufficient. Whether for convenience sake, for police purposes, or otherwise, it was at all events agreed that the vendors should sell one lot only for a public-house, and

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they bound themselves not to sell any other portion of the land unless impressed with the burden of the restrictive covenant. From that date the rest of the property was subject to that restriction, and from that date it was not competent for the vendors in equity to dispose of that property, unless they protected not only *Collins*, but all the rest of the owners of the property, from the inconvenience of having any other public-house or beershop than that for which *Collins* held a lease. That was the intention of the parties. Was that an unlawful or improper intention? The Court being satisfied that that was the intention of the parties, and that the words in the deed expressed and carried into effect that intention, was it capable of argument in a Court of Equity that the persons who claimed the benefit of that covenant were precluded from suing to prevent its breach by a person who knew when he bought that he bought subject to that restriction? That, of course, was the position of *Prosser*, who had purchased part of the property from the *Gaslight and Coke Company*, by whom it had been acquired. The gas company's conveyance contained the restriction, and they accepted it on those terms; cheerfully or otherwise, they became the owners of the land subject to the burden of the covenant. Upon their resale to *Prosser* he also readily accepted the title so restricted, and undertook not to carry on a beershop on the property. I have listened with surprise to the general scope of the argument, which was, that although the Plaintiff was entitled to the benefit of the covenant, the Defendant was at liberty to break it as far as the Plaintiff's right to sue was concerned, and that the Court of Equity had no power to reach such a wrong as that, or to right the Plaintiff, whose power to sue was so contested. The functions of a Court of Equity are to prevent the commission of frauds of any sort, and it is the duty of the Court to suppress chicanery or ingenious devices for the purpose of evading a plain distinct obligation. It has been objected that the proviso was not in the usual form. It is unnecessary to inquire whether this was the first or the ten-thousandth time it had been used. That is not the question before the Court. There is a contract under the hands and seals of the persons contracting, and it is a perfectly valid contract. All the Plaintiff asks is that the property held by *Prosser* and his tenant *Fenning*

should be kept subject to this covenant, which *Prosser* had agreed to, and which *Fenning*, as his tenant, must be taken on the authority of the decided cases to be fixed with constructive notice of. It is in vain for him to say he did not know that *Prosser* could not give him leave to carry on a beershop. The facts of the cases cited were entirely different. *Renals v. Cowlshaw* (1) recognised in the most distinct terms that the intention of the parties to such contracts is to prevail, and that a Court of Equity will enforce that intention. *Kemp v. Bird* (2) proceeds on the same principle. All the Plaintiff asks in this case is to be put in the same position as if the covenant had been made by the Defendant directly with him. But whoever else might have sued at law, in enforcing the contract he would be at best but a trustee of the covenant for the benefit of the Plaintiff, who had a right to the benefit of it. *Prosser* was not injured by the enforcement of the restriction, because he bought not merely with notice but expressly subject to it, and only held the property on that condition. That there is plain evidence here of a plain contract binding on everybody who afterwards became possessed of any portion of the estate is too clear to admit of any kind of question.

Then the only remaining question is whether *Fenning*, by selling beer, as he has done, was breaking the covenant. Recent cases decided by the Court have put that beyond all question. It is not necessary to resort to dictionaries to find out what a "beershop" means. A beershop is a shop where beer is sold independently of any other circumstance. There could have been no doubt, however, in this case, even if the decisions had not been so plain on the point, because this Defendant is selling thirty or forty barrels or more a month, and has a gross of pots in which his customers can carry it away. Clearly he is keeping a beershop, and is thereby violating the covenant. The Court must decide that the intention of the parties is plain, and is in words plainly expressed, and that it had been clearly adopted and acted upon by all of them. Really the only thing to be said in favour of the defence is that *Prosser*, who was a builder, buying land to build upon, took the advice of professional persons (knowing he was bound by the covenant), and was told he might with impunity

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(1) 9 Ch. D. 125 ; 11 Ch. D. 866.

(2) 5 Ch. D. 549, 974.

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break it, and defy any person who sought relief against him. That was *Prosser's* case, but that was not advice in accordance with the plain rights of the parties. The case has been proved, and an injunction must be granted restraining the Defendants from carrying on the beershop business complained of. They are further liable to *Nicoll* for the injury he has sustained, but as the amount of the damage has not been proved, an inquiry will be directed for the purpose of ascertaining it. That amount, with the costs of the action, the Defendants must be ordered to pay.

Solicitors for Plaintiffs: *Nash & Field*.

Solicitors for Defendants: *Bedford & Monier Williams*.

F. G. A. W.

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 Dec. 8.
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ROLLS v. ISAACS.

[1877 R. 48.]

Patent Law—License to use Invention in the United Kingdom—Prior Use of Invention in a British Colony.

The district of *Natal* is a British colony with a separate Government, under a Governor appointed by the Crown; and a law has been passed by the Legislative Council of *Natal*, providing for the granting, in the colony, of patents for inventions:—

Held, that the validity of letters patent under the Great Seal for license to use an invention in the United Kingdom of *Great Britain and Ireland*, the *Channel Islands*, and the *Isle of Man*, would not be impeached by the fact, if proved, of prior use of the invention in *Natal*.

SPECIAL CASE.

By letters patent under the Great Seal, dated the 20th of March, 1871, Her Majesty the Queen granted to *Henry Pout* her special license that he, his executors, administrators, and assigns, should and might, during the term therein expressed, lawfully make, use, exercise, and vend, within the United Kingdom of *Great Britain and Ireland*, the *Channel Islands*, and the *Isle of Man*, an invention of a new material for protecting wood, metal, stone, and other materials; also to be used in the manufacture of cement, and for similar purposes; being a communication to the

said *Henry Pout* from abroad by the first Plaintiff *Jesse Goldsmith Rolls*, of *Durban, Port Natal, South Africa* (since deceased).

Henry Pout filed a specification, declaring that he claimed as the invention the adaptation and use of the juices of the euphorbia plant, first as a paint or covering, and, secondly, as a cement.

By an indenture dated the 20th of September, 1871, the patent was assigned to *Rolls*, who by deed dated the 1st of November, 1876, assigned it to the third Plaintiff, the *Protector Fluid Company, Limited*.

The action was commenced on the 8th of March, 1881, by the first and third Plaintiffs (a second Plaintiff, *Rolls*, spinster, having been afterwards added as the first Plaintiff's representative,) against the Defendants, *M. Isaacs & Son*, for infringement.

Defendants delivered particulars of objections, and, among the rest, the following: "that prior to the date of the said letters patent, namely, from the year 1843 down to the 20th of March, 1871, the said juices were publicly used in Her Majesty's colony of *Natal*, for medicinal purposes, and that the said juices were used by the inhabitants of" the said colony, "as ingredients in a paint or cement to coat the bottoms of sea-going vessels and canoes."

The claim (which was stated by consent for the opinion of the Court, under Order xxxv. of Rules of Court, 1875,) then stated as follows:—

"6. The district of *Natal* was first taken possession of by the British in the year 1843, when it was proclaimed by the Governor of the *Cape of Good Hope* to be a British colony, and it has ever since remained one of Her Majesty's Colonial possessions. Down to the year 1845 it formed part of the settlement of the *Cape of Good Hope*, but in that year it was by letters patent, dated the 30th of April, 1845, constituted a distinct and separate Government.

"7. By letters patent of Her Majesty, dated the 7th of March, 1847, it was ordained and declared that certain persons therein referred to should constitute and be a Legislative Council for the said district of *Natal*, and that the said Legislative Council should have full power and authority to make, constitute, and ordain all such laws and ordinances as might be required for the peace,

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 1881 subject to the approval thereof by Her Majesty in Council.

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“ 8. There is a law dealing with patents in the colony of *Natal*, namely, the *Colonial Act* No. 4 of 1870, to provide for the granting in that colony of patents for inventions.”

The question for the opinion of the Court was, “whether the objections to the said letters patent intended to be relied upon by the Defendants and hereinbefore particularly set forth would, if proved to be well founded in fact, be sufficient in law to impeach the validity thereof.”

Theodore Aston, Q.C., and *Ingle Joyce*, for the Plaintiffs :—

The question is believed never to have been raised before, whether letters patent of this kind would be invalidated by reason of prior user of the invention in a British colony. We submit it would not, for this reason, that the letters patent are granted on the condition that, “if at any time during the said term . . . it shall be made to appear . . . that this our grant is contrary to law, or prejudicial or inconvenient to our subjects in general, or that the said invention is not a new invention, as to the public use and exercise thereof, within our United Kingdom of *Great Britain and Ireland*, the *Channel Islands*, and *Isle of Man*, or that the said [Petitioner] is not the first and true inventor thereof within this realm as aforesaid, these our letters patent shall forthwith cease, determine, and be utterly void to all intents and purposes.” The patent itself states that the invention was communicated from abroad by a person residing in *Natal* ; so that it cannot be said that the Crown has been deceived. The question of whether the invention is new or not, is to be decided by ascertaining whether it is new or not within the *United Kingdom*, the *Channel Islands*, and *Isle of Man*. Only if not new within these specified districts will the grant be avoided.

We are aware of the case of *Brown v. Annandale* (1), following *Roebuck v. Stirling* (2), where it was decided that a person introducing an invention from *England*, where it was well known, into *Scotland*, cannot be considered the first and true inventor within

(1) 8 Cl. & F. 437 ; 1 Webst. P. C. 443.

(2) 8 Cl. & F. 446, n.

the construction of Scotch letters patent. What was there decided was that, the kingdom of *Scotland* having been made by Act of Parliament part of Her Majesty's "realm," a grant of letters patent on the condition that the petitioner was the first and true inventor within that part of the *United Kingdom* which is called *Scotland*, will be held void, if it should turn out that it was not new in *England*. The ground of the decision is very clearly stated in the report of the case in *Webster*; where Lord *Campbell* says (1): "There is no separate patent for the colonies; it may be extended to the colonies as part of the realm." So, in these days, the grant might have been made to extend to the colonies generally, or to the colony of *Natal*. Section 18 of the Act of 1852 (15 & 16 Vict. c. 83) provides for such an extension; but since the passing of the Act, there is no instance known of the grant of the sole use of an invention being made to extend beyond the *United Kingdom*, the *Channel Islands*, and *Isle of Man*.

The *ratio decidendi* of *Brown v. Annandale* (2) as applied to this case is that the colony of *Natal* grants its own letters patent. If a *scire facias* were issued for the cancellation of these letters patent on the ground of prior use in *Natal*, the answer would be that they are perfectly good and valid, notwithstanding such prior user,—and hence that the declaration of avoidance as a monopoly would not extend to them.

The *Statute of Monopolies*, 1623 (21 James 1, c. 3), is that upon which power to grant letters patent may be said to be now based. This statute, by sect. 1, after reciting that the King had, in 1610, published that monopolies were contrary to law; reciting that such declaration was truly consonant to the fundamental laws of the realm; reciting moreover that the King did command that no suitor should presume to move the Crown for matters of that nature, yet that many such grants had been unduly obtained, and unlawfully put in execution, declares and enacts that all monopolies theretofore granted, or thereafter to be granted, for the sole buying, selling, making, or using of anything "within this realm, or the dominion of *Wales*," shall be void and of none effect. Section 5 exempts from the operation of the Act, letters patent theretofore granted, for the sole working or making of any manner

(1) 1 Webst. P. C. 448.

(2) 8 Cl. & F. 437.

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of new manufacture “within this realm,” to the first and true inventor and inventors of “such” manufactures. In other words, the avoiding clause is confined to prior use within the “realm,” which by the present letters patent is defined to be the United Kingdom of *Great Britain and Ireland*, the *Channel Islands*, and the *Isle of Man*.

The word “realm” originally meant *England*, and by the *Act of Union*, 6 Anne, c. 11 (1706-7), *Scotland* was made part of the realm. By the 27 Hen. VIII. c. 26 (1535), it was enacted (sect. 1) that the dominion of *Wales* should be for ever united to the King’s realm of *England* (1). But the language of the *Statute of Monopolies* (1623) seems to shew that even *Wales* was not then part of the “realm”; at any rate the “realm” or “kingdom” of *England* has never been extended to *Natal*; the Queen of *England* is Sovereign of *Natal*, but *Natal* is no part of the “realm” within the meaning of the *Statute of Monopolies*.

It has been long held that within the expression “the true and first inventor” is included any person who brings into the country from “beyond sea” an invention which has never before been used in this country: *Edgebury v. Stephens* (2); *Marsden v. Saville Street Foundry and Engineering Company* (3).

Butcher, for the Defendants:—

The patent is bad both by statute and by common law, supposing we can prove a prior user in *Natal*.

The head-note in *Brown v. Annandale* (4) is as follows: “It is essential to the validity of a Scotch patent that the invention or improvement for which it is granted should be new in *England* as well as in *Scotland*.” At this date (1842) separate letters patent, under different seals, were granted for *England* and for *Scotland*. Scotch patents were granted by an exercise of Royal prerogative in the kingdom of *Scotland*; and not until the Act of 1852 were the two branches of the prerogative in *England* and in *Scotland* united.

The case of *Natal* in relation to this country at the present day is analogous to that of *England* to *Scotland* in 1842. In *Brown*

(1) 1 Bl. Com. 94.

(2) 2 Salk. 447; 1 Webst. P. C. 35.

(3) 3 Ex. D. 203, 205.

(4) 8 Cl. & F. 437.

v. *Annandale* the Attorney-General (Sir *F. Pollock*) was arguing that the word "realm" means only *England*, whereupon the Lord Chancellor (*Lyndhurst*) observed, "Suppose the invention is found not to be new in the colonies. It would be void because they are part of the realm. All became one realm at the Union—*England, Scotland, and the Colonies*" (1).

There is still no Great Seal for the colonies; but the Governor of *Natal* is authorized to issue letters patent for that country: just as in 1842 there was a power in the Crown of granting separate patents for *England* and *Scotland*, though both were parts of the same realm. The Crown could not lawfully grant a patent for the use in *Kent* of an invention not new elsewhere in *England*: see an observation of Lord *Brougham* (2); and similarly the Crown cannot grant a patent for the *United Kingdom, the Channel Islands, and Isle of Man*, for an invention not new in *Natal*, which is part of the realm within the statute of *James I.*

Secondly; there is a proviso, as has been said, that the patent is to be void, if it should be made to appear to the Crown that the Petitioner "is not the first and true inventor thereof within this realm as aforesaid," and the words "as aforesaid" no doubt define this realm as meaning the *United Kingdom, the Channel Islands, and Isle of Man*; but it is nevertheless necessary, by the common law, that the Petitioner should also be the first and true inventor in all parts of the realm, including *Natal*. Thus in *Brown v. Annandale*, where the Petitioner stated "*dictam inventionem novam esse et haud unquam antehac factitatem aut usitatam fuisse per ullam aliam personam aut personas quascunque intra hæc regna, ut intelligit et credit*" (3), and it turned out that the invention had been long used in *England*, Lord *Brougham's* observation was (4): "He deceives the Crown; and the grant would be void independently of the statute." For a like reason this Petitioner deceives the Crown, and the patent is void. The Petitioner should have limited his statement by shewing that he was the true and first inventor in that part of the realm which consists of the *United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man.*

(1) 1 Webst. P. C. 448.

(2) Ibid. 449.

(3) 8 Cl. & F. 442.

(4) 1 Webst. P. C. 443.

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The word "realm" is defined in dictionaries to mean "king's dominions." If the word "realm" be limited to "kingdom" only, then the *Channel Islands* are not within the prerogative, nor was *Ireland* before the Union in 1800 (39 & 40 Geo. 3, c. 67). The case of *Edgebury v. Stephens* (1) was decided in 1688 (Easter Term, 4 Jac. II.), before *England* probably had any colonies, or when, perhaps, the only colony was *Virginia*, then more usually called a plantation.

The other side admit that the novelty must be a novelty throughout the "*United*" Kingdom, so that they admit that the word "realm" means something more than simply "kingdom." Prior user in a foreign country will not invalidate a patent: but if the invention be once brought to *Natal*, which is part of this realm, and used there, no valid patent can be granted by the Crown to use it in this country.

The *Statute of Monopolies* enacts (sect. 6) that any declaration of the avoidance of any monopoly shall not extend to letters patent made to "the true and first inventor and inventors of such manufactures which others at the time of making such letters patent and grants shall not use;" and the statute has received such a construction as that the introducer into this country of an invention known only in foreign parts may be the granter of letters patent (2). So, in *Walton v. Bateman* (3), *Cresswell, J.*, observes: "The party obtaining the patent must be the true and first inventor in this country. If he import from a foreign country that which others at the time of the making of such letters patent and grants did not use, it will suffice."

The present Petitioner does not answer this condition; in the language of Lord *Brougham*, he "deceives the Crown," and the patent is void.

BACON, V.C. :—

I will mention the last point first, namely, the statement by the Petitioner that the invention has not been practised by any one before. If the effect of that statement be what it is contended that it is, namely, a falsification of itself calculated to mislead the

(1) 2 Salk. 447; 1 Webst. P. C. 35.

(2) 1 Webst. P. C. 8.

(3) 1 Webst. P. C. 615.

Crown, then not one of all the numerous patents which have been granted upon the application of a foreigner can have any validity whatever. That is not a matter to be inquired into. The only thing that the Crown desires to be informed of is, whether the invention has been used within this realm. When an invention is communicated by a foreigner to an Englishman, if it should be proved that it has been used in all the other regions of the world, but never here before, the invention may be the subject of a valid patent, and there is no kind of objection to it.

The case in the House of Lords when looked at does not in the slightest degree support such a contention as has been raised. The marginal note, which describes it correctly enough, says: "It is essential to the validity of a Scotch patent that the invention or improvement for which it is granted should be new in *England* as well as in *Scotland*. Accordingly, evidence of the use of an invention in *England* previous to the date of a patent for it in *Scotland* is admissible, and sufficient to make the patent void, *et vice versâ*" (1); and that for perfectly good reasons.

To take up the subject from the beginning, namely, the *Statute of Monopolies*, the terms of the statute are clear and distinct. The statute relates to the kingdom of *England*, and to no other place. Afterwards, by changes which have taken place from the passing of an Act of Parliament, the kingdom of *Scotland* became united to *England*, but the right of granting patents separately in *Scotland* still remained. In the case of *Brown v. Annandale* all that the House of Lords did was to say, that a representation to the authorities in *Scotland*, that an invention was totally new *inter hæc regna*, was an incorrect statement, because the invention was well known in *England*, and therefore the patent was void. There is not a word in the decision which changes or alters the proposition before me, namely, that, inasmuch as there are in *Natal* the means of granting patents within that realm (if it is to be called by that name) if the Queen of *England* grants a patent for the exercise of an invention in this realm, and the thing be a new invention in this realm, the fact of its having been practised previously in *Natal* cannot affect the power of the Crown to grant to the Petitioner the right to exercise the invention which he for

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the first time communicates to the people of this realm. The *Statute of Monopolies* was passed for the public benefit; the prerogative is mentioned in it, and that prerogative is curbed and confined; the limit being that the invention must be new in this country.

I find that this condition is fully complied with in the present case. It is not pretended that any one in *England* ever knew of this invention before the present patentee communicated it. I have been at a loss to follow the argument which has been addressed to me. Certainly *Brown v. Annandale* (1) does not support any part of that argument. There are remarks scattered through the report, and observations bearing upon the subject under discussion, but there is no doubt about the principle. If a thing is known in *England*, a man cannot go to *Scotland* and get a patent for it there, on the pretence that it is a novelty. What application has that case to the case before me? In this case, as I have said, and as in countless other cases, a traveller or a merchant or somebody else finds in a foreign country an ingenious contrivance; he is the first who communicates it to this country. He alleges with perfect truth, addressing the Crown—for the benefit of the inhabitants of *England*—“this is a perfect novelty; nobody ever knew of it before, and I ask you to grant me a patent?” To do what? Not to interfere with the countries where it has been practised—not to interfere with *Natal*—but here in *England* to grant him a patent in this realm; and the patent is so granted. No case has been referred to, and I can more than assume that no case can be found, where such a patent has been held void. There have been grants of patents for inventions communicated from abroad more than can be counted, and no one has ever raised any objection until the ingenuity of counsel suggests that there must now be a new departure, and that henceforward every man who brings an invention never known in this country before, and here makes it public under the protection of letters patent, labours in vain, if it is shewn to have been known before in some foreign country, and that it cannot be the subject of a patent in this country. For to that extent Mr. *Butcher's* argument goes. If it falls short of that, there is no argument to which I can attend. In my opinion that

(1) 8 Cl. & F. 437.

argument is wholly unsustained. I think that a man who brings forward an invention in this country, or for the first time gets a patent for the use of it in this realm—not in *Natal*—has a perfectly good patent.

I am bound to answer the questions proposed to me by the special case in this way: that the objections to the letters patent intended to be relied upon by the Defendants, and hereinbefore particularly set forth, would, if proved to be well founded in fact, not be sufficient in law to impeach the validity of the patent. If the facts stated by way of objection were proved to be perfectly true, they would not, in my opinion, invalidate the letters patent in question.

The costs will be costs in the action.

Solicitors: *Ingle, Cooper, & Holmes*; *E. I. Sydney & Son*.

J. B. D.

In re BENTON.

SMITH *v.* SMITH.

[1881 B. 3046.]

V.-C. B.

1882

Jan. 14.

Married Woman—Restraint on Anticipation—Gift of mixed Residue—Income-producing Fund.

Gift by a testatrix of real and personal estate to trustees upon trust to convert and invest, and to stand possessed of the stocks, funds, and securities representing the same in trust for her children who, being male, attained twenty-one, or, being female, attained that age or married under that age; with a declaration that the shares of daughters should be for their sole and separate use without power of anticipation. Power was given to the trustees, upon the marriage of any of the daughters, to revoke the trusts so far as related to the share of any daughter so marrying, and to settle the same for the benefit of the daughter and her issue as to the trustees should seem fit.

The residuary estate was represented by a sum of cash and certain leasehold houses.

Held, that, the gift being of an income-producing fund with a restraint upon anticipation, the trustees could not pay to the daughters during coverture their shares upon their separate receipt.

SPECIAL case raising the question whether the executors under the will of Mrs. *Benton* could pay the married daughters, upon their separate receipt, their shares in the proceeds of mixed residue.

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Amelia Benton, by her will, dated the 28th of February, 1871, after giving her real and personal estate to the Defendants, her executors and trustees, upon trust to sell and convert into money, and to invest the same in the securities therein mentioned, directed the executors and trustees to stand possessed of the said securities in trust for such her child or children as, being male, attained twenty-one years, or being female, attained that age or married under that age with the consent of her or their guardian if marrying after the testatrix's death, and if more than one in equal shares as tenants in common; with a proviso that issue of children of the testatrix dying in her lifetime should take by substitution their deceased parent's share. And the testatrix thereby declared "that the share or shares as aforesaid (whether original or accruing) of any of my issue being a female shall be for her sole and separate use without power of anticipation. Provided always, and I hereby declare that it shall be lawful for the trustee or trustees for the time being of this my will, upon the marriage of every or any of my daughters, to revoke the trusts aforesaid so far as relates to the share or shares as aforesaid in the trust premises of any daughter so marrying, and to settle the same for the benefit of my daughter and the issue of her then intended marriage" in such manner as to the trustees should seem fit.

The testatrix, who died in December, 1873, left five children, two sons and three daughters.

Of the three daughters, Mrs. *Smith*, the Plaintiff, was married at the death of the testatrix, Mrs. *Yardley* was unmarried and under twenty-one at the death of the testatrix, but had since attained that age and married. The third daughter, *Florence*, was still under twenty-one and unmarried.

The trustees had paid to each of the two sons their fifth share of the residuary real and personal estate of the testatrix.

The *corpus* of the residuary estate was now represented by £700, and certain leasehold houses purchased by the executors with the proceeds of the conversion of part of the testatrix's estate.

Mrs. *Smith* and Mrs. *Yardley* having claimed payment of their shares upon their separate receipts, and the trustees having been advised that, having regard to the clause in the will restraining females from anticipating their shares thereunder, they could not

safely transfer any part of the capital to Mrs. *Smith* or Mrs. *Yardley*, the question was submitted for the opinion of the Court, viz., whether the trustees could safely pay any and what part of the capital of the residuary real and personal estate or of the proceeds of the sale to the Plaintiff and the Defendant.

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Alexander, for the Plaintiff, Mrs. *Smith*, contended that the restraint upon anticipation did not apply to an uninvested sum of money. The distinction in this respect between the gift to a married woman with a restraint on anticipation of a sum of stock or of an income-producing fund, and a gift of a fund not producing income, was recognised by the Master of the Rolls in *In re Ellis' Trusts* (1); and where, as here, part of the fund given is represented by an uninvested sum of £700, the married women are entitled to have their shares of that fund paid out to them upon their separate receipt: *In re Croughton's Trusts* (2).

Chester Jones, for the trustees:—

The question must be answered in the negative. In *In re Croughton's Trusts* the decision turned almost entirely upon the words of the will, which could only be properly carried out by handing over as a sum of money the *corpus* of the realized residue. There being in this case a clear direction to invest the proceeds of the residue, the gift is, not of an absolute sum of money but, of an income-producing fund, with an intention distinctly expressed that the shares of married daughters should be subject to a restraint upon anticipation, which distinguishes the case from *In re Croughton's Trusts*, where, moreover, there was a direction that the married woman's receipts alone should be sufficient discharges. Even where there is an absolute gift of a sum of money to be paid to the married woman or her appointees, the addition of a clause against alienation will prohibit payment of the fund to the married woman upon her separate receipt: *Re Sarel* (3).

Alexander, in reply:—

No inference can be drawn from the words "invest and stand

(1) Law Rep. 17 Eq. 409.

(2) 8 Ch. D. 460.

(3) 4 N. R. 321.

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possessed," as they apply to the shares of sons as well as of daughters. The power to the trustees upon the marriage of daughters to revoke the trusts thereinbefore declared, affords an indication of intention that the daughters should have the fund paid to them if the trustees did not think fit to settle the fund upon marriage. The case is clearly within the principle of *In re Croughton's Trusts* (1), that a bequest of a share of residue, which is represented by a sum of uninvested cash, is payable to a married woman, unaffected by the clause restraining anticipation.

BACON, V.C.:—

The case cannot be said to be altogether plain. In *In re Croughton's Trusts*, which differs essentially from the present case, the trustees were directed to invest the residue and pay the income of the investments to the sister of the testatrix for life. But there was no further direction to invest, and upon the death of the tenant for life the trustees were to divide and pay the residue between and unto the children, and upon the death of the tenant for life, the residue being an ascertained sum standing in Court and uninvested, the gift was a gift of a sum of money. In this case the residuary estate is represented by a sum of £700 and three leasehold houses. The trustees are directed to invest and stand possessed of the proceeds of the residuary real and personal estate upon trusts for the children. It was their duty in carrying out the trust to see that this fund bore interest, and therefore this was an income-producing fund and subject to the restraint upon anticipation just as much as any other part of the testatrix's estate. *In re Ellis' Trusts* (2) was much more like this case than *In re Croughton's Trusts*, and I have no intention of departing from the principle there laid down. The question will be answered in the negative, viz., that the executors cannot safely pay to the daughters their shares upon their separate receipt during coverture.

Solicitors: *Lewis & Sons*.

(1) 8 Ch. D. 460.

(2) Law Rep. 17 Eq. 409.

LEMAITRE *v.* DAVIS.

[1880 L. 2004.]

V.-C. H.

1881

*Ancient Buildings—Right of Support from Buildings—Rebuilding Tenement—
Damage to Neighbour's Vault—Estate of Ecclesiastical Corporation—
Prescription Act—Owner and Contractor jointly responsible.*

Nov. 21, 26,
28;
Dec. 3, 5.

Where ancient buildings belonging to different owners adjoin each other there is a right of support from the building as well as from the land; and this right of support can be claimed under the provisions of the *Prescription Act* (2 & 3 Will. 4, c. 71).

The mere fact that the support is derived from property which belongs to an ecclesiastical corporation does not prevent the right of support being acquired under the Act.

But the enjoyment of the right must have been open and not surreptitious to come within the provisions of the Act. Damage having been done by the wrongful acts of a contractor or his workmen, employed under a contract and specification, to a neighbour's vault, it was held, under the circumstances, that both the employer and contractor were liable for it, and judgment was given for the Plaintiff, with costs against both Defendants.

THE Plaintiff was the lessee, for the residue of a term of years, of a tenement and premises known as the *Mitre Tavern*, situate in *Fish Street Hill*, in the City, together with all easements and appurtenances thereto belonging. The Defendant had entered into a contract to become the lessee for a term of years, and was, as alleged, the owner of an adjoining tenement, and premises known as No. 1, *Monument Yard*. Both tenements were ancient—more than sixty years old. The Plaintiff's case was that in the basement on the eastern side of his premises there was a vault which belonged to, and was occupied with the *Mitre Tavern*; that on the vault there was a layer of earth about three feet in depth, and thirty tons in weight; and that the vault extended to, and underlay the premises of No. 1, *Monument Yard*; further, that adjoining the vault was a cellar appertaining to, and occupied with No. 1, *Monument Yard*; that the eastern wall of the vault was supported by the western wall of the cellar of No. 1, *Monument Yard*, which was a substantial brick structure carried up nearly to the level of the ground floor, and that thence it supported an iron column which carried the back wall of No. 1, *Monument Yard*.

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The Plaintiff also alleged that the wall of the *Mitre Tavern*, upon the eastern side, depended for its support, the right to which had been uninterruptedly and openly enjoyed by the owners of the *Mitre Tavern* for the whole of the above period of time, on the wall of No. 1, *Monument Yard*; and that the owners of No. 1, *Monument Yard*, including the Defendant *Davis*, knew the actual construction of the tenement and premises of the *Mitre Tavern*; that such support was required, and that it was enjoyed as of right; that the Defendant *Davis* caused his tenement and premises to be pulled down, without giving any notice to the Plaintiff of his intention so to do, and that in the course of the demolition of them the western wall of No. 1, *Monument Yard* was pulled down and cut away, no shores or supports being supplied; that the layer of earth on the vault was removed, leaving the crown of the arch bare by such removal, and that there was a breaking through the arch in several places; that the eastern wall of the vault fell out of the perpendicular several inches, bulging outwards, and that the arch, being seriously cracked, threatened to fall in, and was in a very unsafe condition in consequence of the removal of the support which was derived from the western wall previously to the pulling down of it. The Plaintiff stated that before the damage was done to the vault it was used as a store-room and wine cellar; that in consequence of the damage it became unfit for occupation, and that he was caused great inconvenience and loss through the removal of his stock, that being rendered necessary, and the lessening of his cellarage accommodation, and he deposed that a portion of his stock was abstracted from the vault by persons who entered through the holes which were made in the arch.

In consequence of the damage done to the vault, the Plaintiff issued a writ in this action on the 27th of October, 1880, and claimed an injunction to restrain the Defendant *Davis* from entering upon, injuring, or otherwise interfering with the premises of the *Mitre Tavern*, or any part thereof; and damages for wrongfully entering upon, injuring, and otherwise interfering with the premises.

On the motion coming on to be heard on the 11th of November, 1880, an injunction was granted, and leave was given to amend

the writ by adding the words after *Davis*, "his contractor, servants, workmen, and agents," and on the hearing on a subsequent day (18th of November) leave was given to amend the writ and statement of claim by making the contractor, the Defendant *Crabb*, a party to the action, the Defendant *Davis* having alleged that the contractor was liable for the damage done, or claimed an indemnity from him.

On the motion coming on again on the 29th of November, 1880, for an injunction against the Defendant *Crabb*, he undertook to complete all such works as were necessary for making good all damage done to the arch of the vault, and he also undertook to take all necessary and proper precautions for upholding and preserving the party-wall adjoining the arch, and the Defendant *Davis* undertook not to do anything which would interfere, or prevent the Defendant *Crabb* from executing the works, and the motion was ordered to stand over till the trial of the action.

The Defendant *Davis* proposed to rebuild the tenement No. 1 *Monument Yard*, and his case was that he, on the 26th of August, 1880, entered into a contract in writing with the Defendant *Crabb*, a builder, for that purpose. The specification of the works required to be done for the Defendant *Davis* set forth, *inter alia*, that the Defendant *Crabb* was to dig out the basement, to break up and clear out the vaults and all walls, piers, and other work so requiring or as indicated by the plans, and to erect all additional shores that might be necessary; and all the responsibility in respect thereof was to rest entirely with him, and he was to hold the Defendant *Davis* free from all direct or indirect damages or expenses in connection therewith, and throughout until the final completion of the structure. Further, the contractor was to provide all proper protection to the adjoining premises, and make good any damage done thereto during the progress of the works, and he was to clear out the vault at the point indicated in the plan, and make good the walls throughout as described for other walls; to cut away the wall at another point indicated, and to make good the same to level of arch as directed, and he was to be responsible for any damage done by himself or men to the works or to any adjoining or contiguous premises, and to make good the same without extra charge.

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The Defendant *Crabb* agreed to execute all the works mentioned, and required to be done in clearing, and digging out the old foundations and basement of No. 1, *Monument Yard*, and building new foundation cellars according to the true intent and meaning of the specification and conditions annexed, and the drawings referred to therein.

The Defendant *Crabb*, in September 1880, entered into exclusive possession of the premises for the purposes of the contract, and pulled down the tenement No. 1 *Monument Yard*.

On the 16th of November, 1880, the Commissioners of Sewers gave notice under the *Metropolitan Building Act*, 1855, that the arch was a dangerous structure—that it was rotten, bulged, and was defective; and they required it to be taken down within six days.

The Defendant *Davis* contended that if he was liable for any of the acts of injury alleged, which he denied, the Defendant *Crabb* was liable to indemnify him; he denied that the enjoyment of support had been open or was of right, and that no owner ever knew of such support being required, and he submitted that no injurious consequences could have resulted to any adjoining or subjacent structures if the works had been executed with due care; that none of the acts complained of were required by the contract, and that he was not liable.

The Defendant *Crabb's* defence was, that in pulling down the old western wall of the main building of No. 1, *Monument Yard*, a portion of the arch of the vault of the *Mitre*, at the north-east corner, was accidentally broken into, making a hole of about two feet square; and that the arch was very old. He denied the allegations of the Plaintiff in regard to the support of the western wall, and said he had, in pursuance of his undertaking, rebuilt the arch in a solid and substantial manner, and to the satisfaction of the district surveyor, and that any damage that might have been done to the premises had been more than repaired, and compensated for.

The Plaintiff complained that in performing the work of demolition no precautions were taken by shoring; and contended that the new works by the Defendant *Crabb* were rendered necessary for restoring the arch of the vault by the wrongful acts of the

Defendants *Davis* and *Crabb*, or one of them. He denied that the damage done had been more than repaired and compensated for, and said that he had sustained other damages by reason of his premises having been wrongfully entered upon, which damages had not been made good.

It was deposed that of the freehold of No. 1, *Monument Yard*, the rector and churchwardens of the parish of *St. Magnus-the-Martyr* were the owners, and that the records shewed that they had from all time, whereof the memory of man was, received the rents for the use of the church, and the repairs thereof, and that there was no record in the books of the vestry that a grant was made by the rector and churchwardens of a right of support to the premises called the "*Mitre*," or to any of the walls or vaults of the same by any erection on the site of No. 1, *Monument Yard*.

The evidence of the architects and surveyors was very conflicting, the allegations that the western wall of the Defendant was a support to the eastern wall of the Plaintiff, and that the two walls were dependent upon each other for mutual support being denied.

W. Pearson, Q.C., and *J. W. Middleton*, for the Plaintiff:—

It is submitted that upon the principles laid down in the cases of *Bower v. Peate* (1), and *Angus v. Dalton* (2) and *Dalton v. Angus* (3), the Defendants are liable for the damage which has been done to the Plaintiff's vault, and that the Plaintiff is entitled to the relief which he claims. The evidence confirms the Plaintiff's allegations that the wall of his vault was supported by the wall of the Defendant *Davis*, and that the Defendants by their works removed the support which the Plaintiff's wall derived, and that thereby the vault and premises were injured. The case of *Dalton v. Angus* clearly shews that if an ancient building or a part of it be supported by a wall or structure, or land of an adjacent building, the owner of the ancient building has an easement for the support of his building, and that if works are carried on upon the servient tenement whereby the support is removed, the owner of

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(1) 1 Q. B. D. 321.

(2) 3 Q. B. D. 85; 4 Q. B. D. 162.

(3) 6 App. Cas. 740.

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the ancient building has a right to damages. An examination of the decision come to by the House of Lords, and the opinions of the Judges in *Dalton v. Angus* (1) will shew that it was considered that the owner of an ancient building has a right to support from both land and building adjacent. The Defendants were fully aware of the position of the Plaintiff's vault, and they must be jointly held responsible for the damage which was done. The evidence establishes the Plaintiff's case, that the works were done by the contractor under his contract and by the Defendant *Davis's* authority; and that by those works, the removal of the Defendant *Davis's* wall, the vault of the Plaintiff was injured, the Plaintiff is therefore entitled to an injunction, and to an inquiry as to damages for the loss which he has sustained.

Hastings, Q.C., and *W. H. Gover*, for the Defendant *Davis* :—

It is submitted that the case of *Dalton v. Angus* did not decide anything more than a right to support from land. As to the question of liability, the Defendant *Davis* contends that the contractor only is liable. It was a lawful act to build a new house, but it was unlawful to break through the wall of the adjoining vault of the Plaintiff. It was a wilful or negligent act on the part of the contractor, or of his workmen; and the contractor assumed that he was responsible, and had made the damage good: *Gayford v. Nicholls* (2); *Reedie v. London and North Western Railway Company* (3); *Butler v. Hunter* (4). A man who orders a work to be executed, lawful in itself, is bound to see that everything necessary is done to prevent danger to his neighbour's property. If the act of a contractor be lawful, then the principal is liable, but if unlawful he is not. The decisions in *Bower v. Peate* (5) and *Dalton v. Angus* are not in conflict with these principles, but the question in this case did not arise in them. Here the contractor had no authority to do the collateral act complained of—the breaking through the brickwork of the Plaintiff's vault was not required by the contract. It was wrongful, but for that act and the abstraction of goods from the vault the Defendant *Davis* is not responsible: *Hole v. Sittingbourne Railway Company* (6).

(1) 6 App. Cas. 740.

(2) 9 Ex. 708.

(3) 4 Ex. 244.

(4) 7 H. & N. 826.

(5) 1 Q. B. D. 321.

(6) 6 H. & N. 488.

There was no right to any support from the Defendant *Davis's* wall. Assuming that the Plaintiff was entitled to such support, he must allege that he was entitled to it and prove his right; that the support has been taken away, and that the taking away caused the injury, before he can claim damages for the pulling down of the wall: *Peyton v. Mayor of London* (1). The Plaintiff here, even if he has alleged that he was entitled to the right, has not proved it; but he had no right to support from the Defendant's wall to the wall of his vault: *Solomon v. Vintners Company* (2).

There is no natural right in this case, and no easement, for it cannot be inferred that the two houses—built shortly after the great fire of *London*—were built by one proprietor, and that they had a mutual support. If there was a support, how was any owner of the adjoining premises to know it, there being upon the vault so many feet of earth? and to be entitled to support at all it must be obtained openly and of right and not secretly; but the evidence shews that the vault was not supported at all, and there is nothing to prove that any damage was occasioned by the withdrawal of the alleged support of the western wall. The vault was badly built and the masonry was rotten and unstable, but it is not necessary to prove that, it being sufficient to shew that the Plaintiff has not made out his case that he had support from the Defendant *Davis's* wall. The allegations of damage were not heard of till a late period, and were made to bring the case within *Bower v. Peate* (3); but it cannot be shewn that any damage was caused by the infringement of any right. The Plaintiff has not made out his case that the removal of the Defendant *Davis's* wall did cause damage to the vault. But for what was done to the vault, damage from above, the contractor is liable, and his employer is not responsible for the negligence of the contractor in not following the specification: *Steele v. South Eastern Railway Company* (4). The Plaintiff, it is submitted, is not entitled to the injunction which he has claimed.

[The cases of *Tickle v. Brown* (5) and *Smith v. Thackerah* (6) were also referred to.]

(1) 9 B. & C. 725.

(2) 4 H. & N. 585.

(3) 1 Q. B. D. 321.

(4) 16 C. B. 552.

(5) 4 A. & E. 369.

(6) Law Rep. 1 C. P. 564.

V.-C. H. *Robinson*, Q.C., and *L. Henn*, for the Defendant *Crabb*, submitted
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 that as the damage complained of, the cracks in the arch of the vault and the hole two feet square into the vault, had nothing to do with the contract, and were all made good immediately under an order of the Court, there ought to be no injunction granted now.

*W. Pearson*, in reply:—

The question of liability of the Defendant *Davis* is quite clear. He employed the contractor to do the works which were necessary, and, an injury having been done to his neighbour's property, he is liable. The cases of *Gayford v. Nicholls* (1), *Reedie v. London and North Western Railway Company* (2), and *Butler v. Hunter* (3), are not applicable to the facts of this case; but the decisions in the cases of *Gray v. Pullen* (4), *Bower v. Peate* (5), *Pickard v. Smith* (6), and *Bonomi v. Backhouse* (7) and *Backhouse v. Bonomi* (8), and many others which are collected in 4 Q. B. D. 164, settle the question of liability. The work done by the contractor was within the scope of his authority contained in the contract. He acted strictly within the terms of the contract in clearing out the old foundations. The Defendant *Davis* authorized the western wall, the support which the Plaintiff had a right to, to be removed, and it was removed, and in consequence thereof the damage to the Plaintiff's vault occurred. The work was carried out in a negligent way. The Plaintiff has established his case and is entitled to the relief which he claims, but as the facts now stand no injunction in respect of the eastern wall is required.

*Hastings*, Q.C., submitted that there was no case now for an injunction or for damages. The action should be dismissed, as there was not upon the evidence any justification for it. The two cases of *Gray v. Pullen* and *Pickard v. Smith* pointed out the distinction for which he had contended, that the contractor only was liable, if any body was.

(1) 9 Ex. 708.

(2) 4 Ex. 244.

(3) 7 H. & N. 826.

(4) 5 B. & S. 970.

(5) 1 Q. B. D. 321.

(6) 10 C. B. (N.S.) 470.

(7) 1 E. B. & E. 622, 639, 655.

(8) 9 H. L. C. 503, 512.

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HALL, V.C. :—

Several questions in this case have been argued in an elaborate and learned manner, and it will be necessary for me to refer to them, although, having regard to what has taken place, the only question of substance between the parties is that of costs. Of the claim made by the Plaintiff, founded upon the alleged damage which he has sustained, and in respect of which I have been asked to direct an inquiry, I do not propose to take further notice than to say that as the inquiry would not go beyond the complaint made in respect of some wine bins and shelves and a few other things, I do not allow it. If the Plaintiff were under a liability in respect of his covenants with his lessor in regard to the vault, there might be ground for inquiry whether the Plaintiff should have damages; but neither the extent of liability in that respect nor the extent of damage is indicated, and if it were, I do not know how damages could be ascertained. But it appears that the vault has been restored, and is now a better fabric than before, and under all the circumstances it would not be proper to direct any inquiry as to damages. The Plaintiff has put his case too high, and I should not be inclined to give him 1s. damages.

It was contended in the last argument for the Defendant *Davis* that the action is altogether unjustifiable, or, at all events, that the Plaintiff has put forward grounds of complaint which he has not sustained; but that is an argument as to costs: whether the Plaintiff should be paid all or a part of them. If the Plaintiff be right in other respects, I think he is entitled to his costs. Looking at all the circumstances, and seeing what has taken place, and was apparently going on, no one could be surprised that the Plaintiff should come to the Court for an injunction to prevent the trespass, and further interference with his property. There was quite enough to alarm him, and he had sufficient cause for apprehension that further damage would happen, and on that ground alone I could not dismiss the action or say there was no case for an injunction. Though the complaint made has, through the medium of the action, been disposed of, I cannot say that the Plaintiff is not to be treated as a successful litigant. The action must be dealt with as regards the costs as if it were a case in which there had been a substantial litigation. That brings me to

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the consideration of questions of difficulty which have arisen in the case, and as to which I have received a great deal of assistance from the arguments dealing with them. The first question is, whether the claim, looking at the nature of it and supposing there was a support from the Defendant's building, is one on which an action can be maintained, an injury having arisen from there being no longer such support. I have had an opportunity of considering the authorities bearing on the question whether support can be claimed in law from one building by the owner of another building—supposing that the two buildings adjoin each other—the one building being at the extremity of one owner's land and the other building being at the extremity of the other owner's land, and supposing that either of them received support and that there was an alteration in the structure of the other in any way. For the Defendant *Davis* it was contended that such support can be claimed from land only, and that the decision in *Dalton v. Angus* (1) determined that alone; but if an owner has a claim of support against land, can he not enforce such a claim against a building upon it? There is nothing in that case which conclusively settles the point, and in the authorities referred to there, amongst others *Solomon v. Vintners Company* (2); and in the discussions on the subject I do not find that the Judges negatived such a claim. The Lord Chancellor expressly referred to the point of support from a building to a building, but I have not seen any sound distinction drawn between the two cases: if there be a right of support against land, why should there not be against a building? It may be an inconvenient right, but that may be said against all servitudes, as, for instance, that of light—all are attended with some inconvenience. Still it is considered better that they should exist than that property should be injured, and not be capable of being protected. Having that case to guide me, and seeing no distinction drawn between the two rights of support from land and from a building, I consider the law to be as applicable to support from an adjoining building as it is to support from land. And I take the same view as regards this right as that adopted by the Lord Chancellor, and by some of the most eminent Judges, viz., that it is a right within the scope and provi-

(1) 6 App. Cas. 740.

(2) 4 H. & N. 585.

sions of, and is claimable under, the *Prescription Act* (2 & 3 Will. 4, c. 71), s. 2. No doubt Lord *Blackburn* and some of the Judges carefully abstained from expressing any opinion on that point in the case of *Dalton v. Angus* (1), but there was the elaborate opinion of the Lord Chancellor that the right to support from land was claimable under the Act, and Lord *Coleridge* said that he had had the advantage of reading the judgments of his noble and learned friends, and that he contented himself with saying that he entirely concurred in the conclusions at which his noble and learned friends had arrived, and in the reasons which they had given for them. That being so, I think it must be taken that Lord *Coleridge* entertained the same opinion as the Lord Chancellor in regard to the *Prescription Act*. The Act applying to such a case as *Dalton v. Angus*, does it apply to property which belongs, as the Defendant *Davis's* does, to an ecclesiastical corporation, who are restrained from alienation. I have considered this important question, and, though doubts have been expressed upon it, I have come to the conclusion that property held by an ecclesiastical corporation is no impediment to a title being acquired to the right under the Act. The question was discussed in the case of *Earl De la Warr v. Miles* (2), and the reasons and observations of Lord Justice *James* shew that in a case where the right is not excluded, and unless it be excepted, the Act is applicable. I cannot find anything in the Act which excludes such a case as this. Considering the Act to be applicable, has the enjoyment been of right? It would not be of right if it had been *clam*, in the sense of being secret or surreptitious. It was said that if it were something short of that—if it were shewn or appeared to be not open—it would not be an enjoyment as of right, and the statute would not run. In a state of things, where the origin of these two buildings goes so far back, it is very difficult to deal with the case, it being almost impossible to prove anything, on the one hand or the other, affirmatively; therefore the conclusion which I come to is that the enjoyment would not be of right if it was *clam*, but I think the evidence shews that the right was open—that each proprietor of the two tenements knew of the existence of his

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(1) 6 App. Cas. 740.

(2) 17 Ch. D. 535.

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neighbour's cellar ; therefore, as a matter of fact, I hold, so far as it may be necessary, that the enjoyment of the right has not been *clam*, or otherwise than open ; an open enjoyment within the meaning of the Act. The next question is the injury done to the vault. It was said that it was not attributable to the works of the Defendants, or one of them, but to some other cause with which they had nothing to do. That is a matter of fact, but, looking at the evidence and all the circumstances, I come to the conclusion that the injury was attributable to the works of the Defendants, and I speak of them jointly. The suggestion that the injury was attributable to the bad construction of the vault or some other cause, is not correct. Then comes the question whether the Defendant *Davis* is liable for the injury which has taken place, or whether the injury was the wrongful act of the contractor for which the Defendant *Davis* is not responsible. Several authorities have been referred to, and the difficulty is to draw the line, and say under which class of them the case falls. In *Dalton v. Angus* (1) Lord *Blackburn* rather found fault with the decision in *Butler v. Hunter* (2), and was not quite sure whether it fell within the first or the second class of cases. But, considering the two classes, and looking at the facts and circumstances of this case, I think that the just conclusion is that the works must be viewed as a whole. The works were to be done by the Defendant *Davis* in the ordinary course by a contractor ; and the contract and specification, properly read, must be taken to include the works which were done, and which were not objected to, as being done under them. The Defendant *Davis* doing the works with the assistance of a contractor was doing his own works, and it was his duty to see that the works were properly done and that certain precautions were taken, either by himself or his agent, by shoring, to prevent any injury to his neighbour's vault. Such precautions were not taken. The Defendant *Davis* cannot shift the responsibility from himself by saying that he employed a contractor and that it was his wrongful act. It would be a strange thing if principals should be allowed to escape from liability when altering their premises, and erecting new buildings, by saying that they employed contractors

(1) 6 App. Cas. 740.

(2) 7 H. & N. 826.

under the specifications which were drawn up for their guidance, and that the contractors only were liable for any injury which might happen. I apply the principles laid down in *Dalton v. Angus* (1) to the circumstances of this case, and I hold that both the Defendants are liable for the injury which was done. I hold also that both the Defendants are liable for the costs—both being wrongdoers. I think a substantial wrong has been proved by the Plaintiff. I cannot draw any distinction as regards the costs of the injunction and of the hearing of the action. All I have now to do is to give judgment for the Plaintiff, with costs to be paid by both Defendants, and the costs of the motions must be costs in the action.

Solicitors: *Lanfear & Stewart ; Henry Gover ; Thomas Beard & Sons.*

(1) 6 App. Cas. 740.

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[1879 B. 54.]

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1. A testatrix bequeathed an annuity payable out of the rental of certain hereditaments to her sister *C.* for life, with remainder for life to certain persons, and on their deaths the testatrix directed her executors to pay the annuity out of the said rental to the surviving children of *B.* :—

Held, that the children of *B.* took the annuity for their lives only.

Evans v. Walker (1) not followed.

2. The rule against perpetuities requires that not only the extreme limit of the class of persons who may take, but the actual persons who are to take, should be ascertained within the prescribed period.

A testatrix directed property to be sold at a period beyond the limit prescribed by the rule against perpetuities and the proceeds to be divided between such of her grandchildren living at the time of the sale in such proportions as testatrix's sister should by will appoint :—

Held, that an appointment made by a will of the sister before the sale was a bad exercise of the power :

Held, also, that, as the class of grandchildren living at the time of the sale could not be ascertained within the prescribed limit, the gift was void for remoteness notwithstanding that the entire class of grandchildren must be ascertained within the prescribed limit.

ELIZABETH BLIGHT, widow, by her will, dated the 12th of September, 1852, bequeathed the residue of her real and personal property to her sister *Christiana Hartnoll*, with the exception of a certain debt owing to her and of a wharf near *Woolwich* (which she had leased to two tenants), and she devised to her sister *Christiana* during her life an annuity or clear yearly rent-charge of £50, charged on, issuing and payable out of the rental of the wharf. And she provided that after the decease of her sister the said annuity should be applied by her (the testatrix's) executors in the following manner, namely, that "the said annuity charged in manner aforesaid on the rental of my wharf shall be paid to my daughter *Sarah Ann Boate* during her life, and after her decease I direct my executors hereinafter named to pay the said annuity to my granddaughter *Lucy Osborne Boate* during her life, and if *Lucy Osborne Boate*, after having commenced to receive

(1) 3 Ch. D. 211.

the annuity, shall die before the expiration of the term of years under which the wharf is let, then I direct my executors to continue to pay the said annuity out of the rental (if there shall be no children of my said granddaughter) to the surviving children of *Sarah Ann Boate* in equal shares and proportions." Then she gave a certain other life annuity of £30, also charged upon the rental of the wharf, to another granddaughter, and then she directed that after payment of these annuities the surplus income should be accumulated for the purpose of paying off two mortgages which were subsisting upon the wharf, in respect of which she gave directions to her executors for forming the accumulated fund. Then she gave to her executors the following direction: that "after payment of the aforesaid annuities and the payment and discharge of the aforesaid two mortgages, they are to sell by public auction the wharf, which has been previously charged with payment of the aforesaid annuities, and divide the proceeds among such of my grandchildren as may then be surviving and in such proportions as my aforesaid sister *Christiana Hartnoll* may by her will appoint."

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The testatrix died in 1854. *Sarah Ann Boate* and *Lucy Osborne Boate* predeceased *Christiana Hartnoll*, who died in 1877, having by her will purported to exercise the power of appointment above mentioned in favour of *R. H. Hartnoll*, *H. Hartnoll*, children of *Sarah Ann Boate*, and other grandchildren of the testatrix. At the date of this appointment all the children of the testatrix were dead.

Sarah Ann Boate left two children by a former husband who survived *Christiana Hartnoll*, namely, *R. H. Hartnoll* and *H. Hartnoll*.

In *In re Blight, Blight v. Hartnoll* (1), Mr. Justice *Fry* held that the above-named children of *Sarah Ann Boate* took the annuity on the death of *Christiana Hartnoll*, and the first question now argued was whether they took the annuity for life or in perpetuity, or for the duration of the leases of the wharf, which were still continuing.

Cookson, Q.C., and *Grosvenor Woods*, for the Plaintiffs:—

The children of *S. A. Poate* take the annuity for life only:

(1) 13 Ch. D. 358.

FRY, J. *Blewitt v. Roberts* (1); *Lett v. Randall* (2); *Stokes v. Heron* (3);
 1881 *Wilson v. Maddison* (4).

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*J. Pearson, Q.C., Methold, and Oswald, for the children of S. A.
 Boate:—*

These annuities are given to the last takers in perpetuity, or at least for the duration of the lease of the wharf.

We rely on *Evans v. Walker* (5), where it was decided that a gift of an annuity for a life or lives, with remainder to another person without restriction, would be construed as a gift to such person of the capital sum from which the annuity was produced.

Bent v. Cullen (6) was similar to the present one.

The authority of *Blewitt v. Roberts* was doubted in *Yates v. Maddan* (7).

T. J. Edwards, and Mitchell, for other Defendants.

FRY, J., stated the provisions of the will above set forth, and continued:—

The question is, whether the last takers under the gift of this annuity take in perpetuity, or for life, or for the duration of the lease of the wharf? As a general rule there can be no doubt that the gift of an annuity to A. is a gift of the annuity during the life of A. and nothing more. It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, there the annuity is presumed to be a perpetual annuity. It is equally without doubt that there are cases in which the Court has come to the conclusion that the gift is not really that of an annuity, but the gift to a person of the income arising from a particular fund without limit, and there the Court holds that the unlimited gift of the income is a gift of the *corpus* from which the income arises.

It has been argued that those two latter principles apply to the present case. In the first place it has been suggested that a gift

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| (1) Cr. & Ph. 274. | (4) 2 Y. & C. Ch. 372. |
| (2) 3 Sm. & Giff. 83; 2 D. F. & J. | (5) 3 Ch. D. 211. |
| 388. | (6) Law Rep. 6 Ch. 235. |
| (3) 12 Cl. & F. 161. | (7) 16 Sim. 613; 3 Mac. & G. 532. |

of an annuity to *A.* for life with remainder to *B.* is a gift of an annuity to *B.* in perpetuity, because the limitation is expressed in the one case and is not expressed in the other. And undoubtedly that appears to be the view which was entertained by the Vice-Chancellor *Malins* in the case of *Evans v. Walker* (1). He there said this: "I understand the law to be, that when there is a gift of an annuity to one for life, or to several for lives, and then a gift afterwards to another person, without any restriction, that means that the last taker is to have the capital from which the annuity was produced." In my view that statement of the law is inconsistent with the earlier cases of *Blewitt v. Roberts* (2), *Lett v. Randall* (3), and others, and cannot, I think, be insisted upon as the view which has been adopted by the Court for many years in the construction of gifts of annuities. Those cases appear to me to decide that the mere want of limitation in the last gift of the annuity does not import that the annuitant is to take anything more than for life; and for that there is a very good reason. The duration of the life of the first taker is expressed not for the purpose of limiting the gift to the first taker, but of limiting the commencement of the gift to the second or the successive takers, and therefore the principle of *expressio unius est exclusio alterius* does not apply. Therefore I think that the argument on that ground fails.

The next inquiry is this, whether in the present case I really have the gift of an appropriated fund and not of an annuity pure and simple. In my judgment there is not an appropriated fund. I find that what the testatrix has done is to charge this annuity with other annuities upon a particular rental, and to provide for the accumulation of every farthing which does not go to those annuitants. That is not, in my judgment, the appropriation of the fund; it is merely a charge. What I understand by the appropriation of a fund for the purpose of the rule in question is the setting aside a sum of money or property to meet the particular gift and to meet nothing more. There being a complete application of the residue in this case, it seems to me impossible to say that this is an appropriation of the fund unless I am prepared to

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(1) 3 Ch. D. 211.

(2) Cr. & Ph. 274.

(3) 3 Sm. & Giff. 83; 2 D. F. & J. 388.

FRY, J. hold that every charge of an annuity on any property and every gift of an annuity out of any property is an appropriation of the fund to meet the annuity so as to be a gift of the fund. That is not, in my judgment, the law of the Court. I think, therefore, there is nothing whatever to shew that the annuity given is more than for the lives of the last takers. I will make this further observation, that on looking at the language carefully, it appears to me that the testatrix rather implies that the annuity would cease at the end of the life of each taker if she did not direct it to be continued; because although she speaks of "the said annuity," she speaks of it as a thing which it is necessary for her to direct to be continued after the life of each taker—words which rather import that she considered the annuity only for life unless she expressed the contrary. I think, therefore, that the annuity is, as I have already said, only for the lives of the takers, and I must make a direction accordingly,

Cookson :—That will be half for the life of one and half for the life of the other?

FRY, J. :—Yes.

The second question which arose was whether the appointment made by the will of *Christiana Hartnoll* was void under the rule against perpetuities.

Cookson, Q.C., and *Grosvenor Woods*, for the Plaintiffs :—

The appointment fails, because the power is to appoint among a class who are not to be ascertained until the wharf is sold (for that is the plain meaning of the words "then surviving"), and that period might not arise until after lives in being at the death of the testatrix and twenty-one years after.

The power was improperly exercised, for it was not to be exercised until the wharf was sold, and *Christiana Hartnoll* died before that period arrived.

J. Pearson, Q.C., *Methold*, and *Oswald*, for the *Hartnolls* :—

The words "then surviving" may be taken to mean surviving

at the date of the appointment by *Christiana*, and should be so interpreted in order to carry into effect the bounty of the testatrix.

The rule against perpetuities is not infringed, because the extreme limit of the class of grandchildren must have been ascertained at the death of the last of the children of the testatrix, although the selection among them by appointment might be made later: *Avern v. Lloyd* (1); *Birmingham Canal Company v. Cartwright* (2).

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[FRY, J., referred to *Gilbertson v. Richards* (3).]

T. J. Edwards, and *Mitchell*, for other Defendants.

Cookson, in reply.

FRY, J.:—

The question which I have now to decide arises upon the same portion of the will to which I have already adverted. The testatrix, at the time of making her will, was possessed of this property subject to two mortgages, and by her will she created certain annuities or rents-charge upon this property payable out of the rental of it. Having done so, she directed that the surplus of the rental should be accumulated for the purpose of paying off the two mortgages subsisting upon the property, and she directed that her executors, after payment of the aforesaid annuities, and payment and discharge of the aforesaid two mortgages, were to sell by public auction the wharf, which had been previously charged with payment of the aforesaid annuities, and divide the proceeds among such of her grandchildren as might then be surviving, and in such proportions as her sister *Christiana Hartnoll* might by her will appoint. In my judgment, the scope of the testatrix's will was to direct the realization and division of the proceeds produced by that realization of her property as and when the property became free from incumbrances and not before, her desire being that this property should be sold when it was so freed. That appears to me to be plainly expressed in her will.

Now, the first question arises upon the words "then surviving."

(1) Law Rep. 5 Eq. 383.

(2) 11 Ch. D. 421.

(3) 4 H. & N. 277; 5 H. & N. 453.

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According to the contention of Mr. *Cookson*, they mean “surviving at the period when the property became free from the mortgages and the annuities.” According to the contention of Mr. *Pearson*, they mean the time when *Christiana Hartnoll* made her will. I am bound to say that according to my view of the plain meaning of words, according to the ordinary understanding of the English language, the word “then” refers to the period which has been previously referred to, namely, the sale and distribution of the proceeds of her property upon its becoming free from incumbrances. To read it the other way would, I think, be a very forced construction, and one which I am not at liberty to put on these words.

The result is, that the proceeds of the property are to be distributed amongst such of the grandchildren as should be living at the time of the sale, in such proportions as *Christiana Hartnoll* should by her will appoint.

It is then contended that the persons who take under *Christiana Hartnoll's* will are entitled to nothing. What happened was this: Mrs. *Hartnoll* made her will in 1876. She died in 1877. The last payment of the mortgages was in 1878, and the annuities are not yet absolutely satisfied. In that state of facts two difficulties are presented in the way of the validity of the gift to the appointees of *Christiana Hartnoll*. The first is this:—The period at which the mortgages and annuities were paid off may or may not be after the expiration of a life in being at the time of the testatrix's death and twenty-one years after. The class to take are to be ascertained on the happening of that event, which event is beyond the limits of the rule against perpetuities. The class, therefore, cannot be said to be ascertained within that period. To that the answer is made, that although the class cannot be ascertained exactly, the extreme limit of the class can be ascertained, because all the grandchildren must be born within the life in being and twenty-one years after the death of the testatrix, and it is said that that satisfies the rule against perpetuities. In my judgment it does not. The rule against perpetuities requires, in my view, the ascertainment within the period not only of the extreme limits of the class of persons who may take, but of the very persons who are to take, and that because the rule is

aimed at the practical object of telling who can deal with the property, and if you cannot tell who are entitled to the property, but only who may become entitled to the property, the property is practically tied up.

The second objection, which I think is equally fatal, is this, that *Christiana Hartnoll* exercised a power of appointment amongst a class of persons who were not ascertained at the time she exercised it. The class were to be the grandchildren living at the satisfaction of the mortgages and the annuities. Neither mortgages nor annuities had been satisfied when she made the appointment, and she did not therefore know between whom she was to appoint. I think that where a power of appointment amongst a class of people is given, the appointor must know the class—must be able to ascertain the class amongst whom he or she is so to divide the property. It is a discretionary power to be exercised with reference to the respective circumstances and merits of the persons who are to take, and that cannot be exercised where the persons are not known. To use an illustration which I put during the course of the argument, if a power were given to *A.* to appoint amongst his children who should be living at the return of *B.* from *Rome*, and that was exercised by *A.* before *B.* returned from *Rome*, it appears to me to be a bad exercise of the power. Now that is exactly what happened here. *Mrs. Christiana Hartnoll* was to give it amongst the grandchildren surviving the payment off of the mortgages and annuities, and she purported to do that before either one or the other had been satisfied. The gift, therefore, is, in my judgment, bad.

Solicitor for Plaintiffs: *E. W. Owles.*

Solicitors for Defendants: *Sidney & Cross; W. Bristow; G. T. Shaft.*

FRY, J.

1881

BLIGHT

v.

HARTNOLL.

C. W. C.

FRY, J.

1881

Dec. 10.

MORDAUNT v. BENWELL.

[1874 M. 176.]

*Partition Action—Real Estate—Decree for Sale—Application of Proceeds of Sale—Real and Personal Representatives—Conversion—Partition Act, 1868 (31 & 32 Vict. c. 40), s. 8—Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), ss. 23–25—Settled Estates Act, 1877 (40 & 41 Vict. c. 18), ss. 34–36.*

106BD496 A decree for the sale of real estate having been made in a partition suit, the property was sold and the proceeds of sale were paid into Court. Three of the persons entitled to shares in the property died intestate before the money was distributed, leaving their father their heir-at-law and sole next of kin. He took out administration to each of them, and then died intestate :—

*Held*, that the father took his children's shares of the money as their heir-at-law, but that he took them as money, and that on his death they passed to his personal representative, and not to his heir-at-law.

## SECOND FURTHER CONSIDERATION.

This suit was instituted to carry into execution, under the direction of the Court, the trusts of two wills and a marriage settlement, and to have the rights of all the persons interested in certain real estate ascertained. The bill also prayed that a partition of the property might be made among the several persons entitled thereto, or, in the alternative, for a sale of the property and a division of the proceeds of sale among the persons entitled thereto.

By the decree made at the hearing of the cause on the 5th of June, 1875, various inquiries and accounts were ordered to be made and taken, and on the hearing on further consideration on the 9th of March, 1877, an order was made directing (*inter alia*) the sale of the property and the payment of the proceeds of sale into Court. The property was afterwards sold and the proceeds of sale paid into Court. Three of the persons interested in the property were *Eliza Mittie Hill*, *Montague Day Hill*, and *Eliza Frances Hill*, children of *John Compton Hill*, who were all infants at the time when the bill was filed, but who all afterwards attained twenty-one. *Eliza Mittie Hill* died on the 1st of November, 1878, intestate; *Montague Day Hill* died on the 15th of October, 1879, intestate; *Eliza Frances Hill* died on the 1st of July, 1880, intes-



tate. *John Compton Hill* was the heir-at-law and sole next of kin of each of the three, and he took out administration to each of them. The property was not all sold until after the death of *Montague Day Hill*, but it had all been sold and the purchase-money paid into Court before the death of *Eliza Frances Hill*. *John Compton Hill* died intestate in August, 1880.

One of the questions now raised was whether the shares of his three deceased children of the moneys in Court, to which *John Compton Hill* had become entitled, formed part of his real or of his personal estate.

*Glasse*, Q.C., and *Stallard*, for the Plaintiffs.

*Stallard*, for the heir-at-law (who was also the administrator) of *J. C. Hill*:—

During the lives of the three children their interests in the property, though converted into money, remained (by virtue of sects. 23–25 of the *Leases and Sales of Settled Estates Act*, 1856, which are, by sect. 8 of the *Partition Act*, 1868, incorporated with that Act) real estate for the purpose of succession: *Foster v. Foster* (1); *Mildmay v. Quicke* (2); and passed, on their respective deaths, to their father as their heir-at-law. He did nothing in his lifetime to convert the shares into personalty, and on his death they, therefore, passed as real estate to his heir.

[FRY, J.:—If a testator, by his will, directs the conversion of his real estate into money for a purpose which does not exhaust the whole of the money, and his heir-at-law consequently takes the surplus of the money, does he not take it as money, and does it not on his death pass to his personal representative?]

*Curteis v. Wormald* (3) may be relied on against me; it was the converse of the present case. The decision was that the next of kin took land, which had, under the trusts of a will, been bought with personal estate for a purpose which had afterwards failed, as land and not as money. But in that case there had been an absolute conversion under the trusts of the will. Here, under the provisions of the Act, the money was liable to be laid out in the

(1) 1 Ch. D. 588.

(2) 6 Ch. D. 553.

(3) 10 Ch. D. 172.

FRY, J.  
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FRY, J. purchase of other land, and there had been no election on the  
 1881 part of the father to take it as money. And, with regard to the  
 MORDAUNT two children who died first, the land had not all been sold before  
 v. their deaths, but some of it remained actually land at the times of  
 BENWELL. their deaths.

*Dawney*, for the next of kin of *J. C. Hill* (other than his heir-at-law), was not heard.

*Lawson*, *Langley*, *Byrne*, *J. Chester*, and *W. Fooks*, for other parties.

FRY, J. :—

The case stands shortly thus: *John Compton Hill* became entitled on the deaths of his three children to their shares of certain real estates, as their heir-at-law. By the decree made in this suit, while they were infants, the estates had been directed to be sold, and when he died the estates had all been sold, and the money produced by the sales was in Court. The shares of the deceased children were then in the condition of money, and, under sects. 23 and 24 of the *Leases and Sales of Settled Estates Act*, they could not be reinvested in land without his consent, and on his petition, and he was entitled, if he chose, to receive the shares out of Court as money. He never gave any consent to the reinvestment of the money in land. It was in fact money, and, as between his real and personal representatives, it must go as money, unless there is any controlling direction that it shall go as land. There is no such direction, and therefore the money must go as money to the personal representative of *J. C. Hill*.

Solicitor for heir-at-law: *J. I. Solomon*.

Solicitors for next of kin: *Whyte, Collisson, & Prichard*.

Solicitors for Plaintiffs: *G. H. Cole & Son*.

Solicitors for other parties: *G. Aldham*; *T. H. Devonshire*; *W. H. Hudson*.

W. L. C.

*In re* COLGAN (INFANTS).

[1881 C. 4323.]

FRY, J.

1881

Dec. 17, 20.

*Infant—Maintenance—Allowance beyond Provision made by Will—Trust for Accumulation of Surplus Income—Jurisdiction on Summons.*

A testator gave the residue of his estate to trustees, upon trust out of the income to pay an annuity of £220 to his widow, and then to pay to his daughter two yearly sums of £100 for the maintenance and education of her infant son and daughter respectively (by a former marriage), as regarded the son so long as he should be under twenty-five, and as regarded the daughter so long as she should be under twenty-one or unmarried. The residue of the income was to be accumulated during the life of the widow, and on her death the testator, after certain provisions for his son and daughter, directed his trustees to pay £10,000 to his daughter's son on his attaining twenty-five; and to pay to her daughter £10,000 on her attaining twenty-one, or marrying under that age, and in the event of her dying before she should have attained twenty-one or married, the £10,000 was to fall into the residue. And the testator gave the residue of the trust estate equally between his daughter and her two children.

Upon a summons taken out after the testator's death in the matter of and on behalf of the infants, with the consent of the testator's widow (who was seventy-seven years of age), and of their mother and her second husband (so far as they were able to consent), an order was made increasing the allowances for the maintenance and education of the infant son and daughter by £150 and £120 per annum respectively, to be paid out of the income of the estate and the accumulations thereof.

But it was ordered that the trustees should hold the interests of the infants respectively under the testator's will as a security for the purpose of recouping to any person entitled thereto such sums of money as would be equivalent to the sums which would have arisen from such part of the income as should be applied in payment of the increased allowances, in case the same, instead of having been so applied, had been accumulated as directed by the will.

## ADJOURNED SUMMONS.

This was a summons asking for the payment of an increased allowance for the maintenance and education of two infants.

*John Skilbeck*, the grandfather of the infants, by his will, dated the 21st of December, 1877, after bequeathing various specific and pecuniary legacies, gave, devised, and bequeathed all his real

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estate and all other his personal estate to three trustees therein named, upon trust for sale and conversion into money. And he declared that the trustees and trustee for the time being of his will should, out of the moneys to be realized from such sale and conversion, and of his ready money at the time of his death, pay his funeral and testamentary expenses, debts, and legacies, and should invest the residue of the same moneys in manner therein mentioned; and should out of the income arising from the investments in the first place pay to his wife the yearly sum of £220, and in the next place pay to his daughter, Mrs. *Taylor*, the yearly sum of £100 for each of his grandchildren *Arthur Colgan* and *Emily Colgan* (the children of Mrs. *Taylor* by a former husband), as regarded *Arthur Colgan* so long as he should be under the age of twenty-five years, and as regarded *Emily Colgan* so long as she should be under the age of twenty-one years or unmarried, these sums to be paid to Mrs. *Taylor* for the maintenance, education, and support of the two grandchildren respectively; and as to any residue of the income to accumulate the same during the lifetime of the testator's wife. And, upon the death of his wife, the testator directed that the trustees should stand possessed of the trust premises in trust to pay to his son *Tom*, if he should be living, the sum of £3000, for his own absolute use and benefit, but, if the same should not be personally claimed by him within two years from the day of the testator's death, then the same sum should form part of the testator's residuary estate, and his son should not be entitled to any interest on the said sum; and on further trust to invest the sum of £3000 and pay the income thereof to his daughter Mrs. *Taylor*, for her separate use without power of anticipation; and upon her death the trustees were to stand possessed of the £3000 in trust for such person or persons as Mrs. *Taylor* should by will appoint, and, in default of appointment, in trust to apply the same as part of the testator's residuary estate. And on further trust to pay to *Arthur Colgan*, on his attaining the age of twenty-five, the sum of £10,000 for his own use and benefit absolutely. And on further trust to pay to *Emily Colgan*, on her attaining the age of twenty-one, or marrying under that age, the sum of £10,000, for her own sole use and benefit absolutely. And,



in the event of her death before she should have attained the age of twenty-one or married, upon trust to apply the sum of £10,000 so bequeathed in trust for her as part of the testator's residuary estate. And, as to the residue of his trust estate, on trust for Mrs. *Taylor*, *Arthur Colgan*, and *Emily Colgan*, in equal shares as tenants in common, the share of Mrs. *Taylor* to be payable to her as soon as might be, and the shares of the grandchildren respectively to be paid to them on their respectively attaining the age of twenty-one.

By a codicil to his will the testator revoked the legacy of £3000 to his son *Tom*, and bequeathed to him in lieu thereof a sum of £500; and he directed his executors and trustees to pay such legacy to him as soon as they could after the testator's decease.

*Arthur Colgan* was born on the 19th of September, 1861, and *Emily Colgan* on the 23rd of September, 1866. On the 6th of August, 1881, after the death of the testator, Mr. Justice *Fry* appointed Mr. and Mrs. *Taylor* guardians of the two infants during their respective minorities, and ordered the two sums of £100, directed by the will to be applied for the maintenance, education, and support of the infants, to be paid to Mr. and Mrs. *Taylor* as their guardians.

On the 2nd of December, 1881, a summons was taken out on behalf of the infants, by Mr. *Taylor* as their next friend, asking that, in addition to the sums directed by the will of the testator to be paid for the maintenance and education of the infants, the further sum of £150 per annum might be allowed for the maintenance and education of *Arthur Colgan*, and the further sum of £120 per annum for the maintenance and education of *Emily Colgan*, as from the 1st of July, 1881, and for the time to come during their respective minorities, or until further order, and that such allowances might be paid by the trustees to Mr. and Mrs. *Taylor*, as the guardians of the infants, out of the income of the fund set apart to meet the two legacies of £10,000 each given to the infants by the testator's will. There was evidence that to meet the two legacies of £10,000, stocks valued at over £20,000 had been set apart by the trustees, and that the residue of the testator's estate was estimated as worth more than £14,000.

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The only near relatives of the infants living were their mother ; their maternal grandmother (the testator's widow), who was seventy-seven years of age ; their maternal uncle, *Tom Skilbeck* ; and *Ellen Colgan*, a paternal aunt of the half blood.

The hearing of the summons was adjourned into Court. The testator's widow consented to the application, and Mr. and Mrs. *Taylor* also consented so far as they could legally do so. *Tom Skilbeck* was not represented.

Glasse, Q.C., and *Maidlow*, for the summons :—

One question is whether the Court has jurisdiction on summons.

[*Vaughan Hawkins*, for the trustees :—

In re Howarth (1) shews that for the purpose of dealing with the estate of an infant it is not necessary that an action should be brought.

He referred also to *Re Arbuckle* (2).]

The Court has in many cases given maintenance to an infant who was only contingently entitled to property, when no maintenance had been provided in the will or settlement by which the infants' interest was created: *Re Robinson* (3). The Court has also directed an allowance for the maintenance of infants notwithstanding a trust for the accumulation of income: *Havelock v. Havelock* (4). It is a matter for the discretion of the Court. *Weatherall v. Thornburgh* (5) shews that, if the testator's widow should live more than twenty-one years from his death, and the trust for accumulation thus become void under the *Thellusson Act* (an event which is very unlikely, the widow being now seventy-seven), there will be an intestacy as to the surplus income during the rest of the widow's life. But there is an ample capital to which the infants are entitled, out of which any deficiency resulting from an increase of the allowance for maintenance can be recouped.

(1) Law Rep. 8 Ch. 415.

(2) 14 W. R. 535.

(3) 16 W. R. 1106.

(4) 17 Ch. D. 807.

(5) 8 Ch. D. 261.

[They also referred to *Stretch v. Watkins* (1), *Josselyn v. Josselyn* (2), *In re George* (3), and *In re Cotton* (4).]

Vaughan Hawkins, for the trustees :—

The difficulty arises from the fact that there is an outstanding interest *pur autre vie* in third parties, though it is a very remote interest.

FRY, J.:—

I will see if I can frame an order such as will not injure the interests of third parties.

Dec. 20. FRY, J., handed to the Registrar minutes of the following order, stating that he had framed them taking as a precedent *Re Arbuckle* (5):—

The Judge being of opinion that it is fit and proper, with a due regard for the interests of all parties entitled under the will of the testator, that the annual sum of £150 should be allowed for the future maintenance and education of the infant *Arthur Colgan*, in addition to the yearly sum of £100 bequeathed for that purpose by the will of the testator, and that the annual sum of £120 should be allowed for the future maintenance and education of the infant *Emily Colgan*, in addition, &c. And it appearing that the only fortune of the infant *Arthur Colgan* consists, in addition to the said £100 a year, of the contingent legacy of £10,000 and the one-third share of residue bequeathed to him by the will, and that the only fortune of the infant *Emily Colgan* consists, in addition, &c., of the contingent legacy of £10,000 and the one-third share of residue bequeathed &c., and that the only persons entitled under the terms of the will in the trust moneys thereunder are, in addition to the infants, *Elizabeth Skilbeck*, widow, and *J. F. Taylor* and *Harriet* his wife, and that the persons entitled under the *Statute of Distributions*, who are or may become interested in the accumulations of the said moneys in the event of *Elizabeth Skilbeck* surviving the period of twenty-one years from the death of the testator, are *Elizabeth Skilbeck*, *Tom Skilbeck* and *Harriet Taylor*, and that *Elizabeth Skilbeck* is now seventy-seven years of age. And *Elizabeth Skilbeck* by her counsel appearing and consenting, and *J. F. Taylor* and *Harriet* his wife by their counsel appearing and, so far as they are able, consenting, Order increased maintenance of the infants respectively as asked for to be paid by the trustees to the guardians out of the income of the testator's estate and the accumulations thereof, and Order that

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(1) 1 Madd. 253.

(2) 9 Sim. 63.

(3) 5 Ch. D. 837.

(4) 1 Ch. D. 232.

(5) 2 Set. 726.

FRY, J.

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the trustees do hold the interests of each of the infants respectively in the legacies and residue under the will as a security for the purpose of recouping to any person entitled thereto such sums of money as will be equivalent to the sums of money or funds and securities which would have arisen from such part of the annual income of the trust moneys as shall be applied in payment of the said sums of £150 and £120 respectively in case the same, instead of having been so applied, had been accumulated as in the will directed. Order that a copy of this order be indorsed on the probate of the will.

Costs as between solicitor and client of applicants and of the trustees, of the application and consequent on the order, to be paid by the trustees out of the income of the estate or the accumulations thereof.

Solicitors: *Redpath & Holdsworth*, agents for *Shackles & Son*,  
*Hull*.

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EMDEN *v.* CARTE.

[1880 E. 0271.]

*Solicitor—Costs—Charging Order—“Property recovered or preserved”—23 & 24 Vict. c. 127, s. 28.*

C. A.

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FRY, J.

July 15.

C. A.

Nov. 3.

An undischarged bankrupt, without the knowledge of the trustee in his bankruptcy, brought an action, claiming (*inter alia*) remuneration for services rendered by him as an architect to the Defendant, and damages for wrongful dismissal. The Defendant, without admitting any legal liability to the Plaintiff, paid £360 into Court. The Plaintiff took out a summons to have the money paid out to him, but before the summons was heard the action came to the knowledge of the trustee, and he obtained an order joining him as co-Plaintiff in the action, on the ground that the remuneration and damages claimed were his property. The bankrupt's solicitor then applied for a charging order on the £360 in respect of his costs, charges, and expenses of or in reference to the action:—

*Held* (reversing the decision of *Fry, J.*), that the bankrupt's solicitor was entitled to a charging order for his costs up to the time of the intervention of the trustee.

When the Court makes an order under the *Solicitors' Act* (23 & 24 Vict. c. 127), s. 28, declaring a solicitor entitled to a charge upon the property recovered or preserved in an action, it is the duty of the Judge to limit the order to costs properly incurred in recovering or preserving the property.

Money paid into Court by a defendant, although accompanied by a defence denying legal liability, may be taken out of Court by the plaintiff; and is, therefore, property “recovered or preserved” within the 28th section of the *Solicitors' Act*.

*Berdan v. Greenwood* (1) followed.

THE Plaintiff was an architect. By his statement of claim he alleged that the Defendant had agreed to employ him as his architect in the building of a theatre; that he had prepared specifications and plans and otherwise acted as the architect and agent of the Defendant; and that on the 9th of June, 1880, the Defendant had dismissed him. The action was commenced on the 11th of June, 1880. The Plaintiff claimed an injunction to restrain the Defendant from employing any other person as his architect for the building of the theatre and from using the Plaintiff's plans and specifications without his consent; specific performance

(1) 3 Ex. D. 251.

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of the agreement; £1790 remuneration for services rendered to the Defendant, and £3000 damages for wrongful dismissal and breach of the agreement. On delivering his statement of defence on the 15th of November, 1880, by which he denied the alleged agreement, and did not admit legal liability to the Plaintiff, the Defendant paid £360 10s. into Court, alleging that this was the utmost amount to which the Plaintiff could, on his own shewing, be entitled. The Defendant also offered to deliver to the Plaintiff all plans and specifications prepared by him. The Plaintiff had been adjudicated a bankrupt on the 30th of April, 1878, and had not obtained an order of discharge. The Defendant did not know this when he delivered his statement of defence. The action was commenced without the knowledge of the trustee in the bankruptcy. After it came to his knowledge, he, on the 26th of November, 1880, took out a summons asking for payment of the £360 10s. to him. *Emden* had on the 19th of November taken out a summons for the same purpose. Before these summonses had been heard the trustee, on the 28th of November, took out another summons, asking that he might be substituted as Plaintiff, on the ground that the original Plaintiff had no interest in the subject-matter of the action. On the hearing of this summons Mr. Justice *Fry*, on the 11th of April, 1881, held (1) that the title to the remuneration and damages claimed had passed to the trustee, but that the Plaintiff had still an interest in the other relief claimed. Under these circumstances an order was made adding the trustee as a co-Plaintiff and giving him the conduct of the action. This decision was afterwards affirmed by the Court of Appeal (2). On the 14th of April, 1881, the solicitor who had acted for the original Plaintiff in the action took out a summons, asking for a declaration that he was entitled to a charge upon the £360 10s. in Court for his taxed costs, charges, and expenses of or in reference to the action, as the solicitor employed by the Plaintiff in the prosecution thereof, and for taxation and payment immediately. The Chief Clerk was of opinion that the solicitor was entitled to a charge for his costs, &c., up to the date of the payment into Court. The applicant was not satisfied with an order thus limited, and at his request the hearing of the summons

(1) 17 Ch. D. 169.

(2) 17 Ch. D. 768.

was adjourned before the Judge, and was afterwards adjourned into Court. The summons came on for hearing on the 15th of July, 1881.

*A. Beddall*, for the summons:—

The money paid into Court has been in fact “recovered or preserved” by means of the action for the benefit of the trustee, and, under sect. 28 of the Act 23 & 24 Vict. c. 127, the solicitor is entitled to an order in general terms for payment of his taxed costs out of the fund, without any such limitation as was proposed by the Chief Clerk: *The Heinrich* (1). *Clover v. Adams* (2) is almost identical with the present case. There the defendant did not, as here, deny the whole cause of action. But, inasmuch as a defendant may do that and at the same time plead payment into Court; *Berdan v. Greenwood* (3); there is really no distinction between the present case and *Clover v. Adams*. If the case is within sect. 28, it is imperative on the Court to make the order, though the words are only “it shall be lawful”: *Reg. v. Bishop of Oxford* (4); *In re Neath and Brecon Railway Company* (5). The Taxing Master will disallow any part of the costs which has been improperly incurred. The trustee gets the benefit of the action and he must take the burden also. The bankrupt had a good cause of action until the trustee chose to intervene: *Jameson v. Brick and Stone Company* (6); and the solicitor’s right is not affected by the fact that the money will go not to his original client but to the trustee. The trustee will have the benefit of the solicitor’s professional services, and the solicitor must be treated as having acted for the real owner of the fund: *Bulley v. Bulley* (7). Under sect. 80 of the *Lands Clauses Act* the practice is always to order payment of costs according to the Act, leaving the Taxing Master to deal with the items.

*F. Turner*, for the trustee:—

The Court is entitled to look at all the circumstances, and to decide now whether the solicitor is entitled to any charge, and to

(1) Law Rep. 3 A. & E. 505.

(2) 6 Q. B. D. 622.

(3) 3 Ex. D. 251.

(4) 4 Q. B. D. 245, 525; 5 App. Cas. 214.

(5) Law Rep. 9 Ch. 263.

(6) 4 Q. B. D. 208.

(7) 8 Ch. D. 479.

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what extent ; there is no use in postponing the decision until after the question has been discussed before the Taxing Master. *Reg. v. Bishop of Oxford* (1) does not apply.

[FRY, J., referred to *Macdougall v. Paterson* (2).]

The trustee is ready to consent to an order giving the solicitor a charge for his costs up to the time of the payment into Court. That is all he can be entitled to. He really wants to make the trustee pay the costs incurred in resisting his claim. That would be unreasonable, and *Bulley v. Bulley* (3) is not an authority for so doing.

*Everitt*, for the Defendant.

*A. Beddall*, in reply.

FRY, J., after stating the effect of sect. 28, continued :—

At the time when the Plaintiff brought the action he was an uncertificated bankrupt, and I held in the first place, and the Court of Appeal has affirmed my decision, that, as between the Plaintiff *Emden* and his trustee in bankruptcy, the moneys which he sought to recover in the action belonged to the trustee. The solicitor for Mr. *Emden* now asks to have a charging order on the fund in Court in the terms of sect. 28, and he says that he has a statutory right to that charge.

The effect of such a charge would undoubtedly be somewhat startling, because it would give him a claim against the fund which belongs to the trustee for the costs incurred before me and before the Court of Appeal in resisting the right of the trustee. In other words, the trustee would have to pay circuitously for the attempt of Mr. *Emden's* solicitor or of Mr. *Emden* himself to defeat the trustee's title. If the Act of Parliament requires me to come to that conclusion, it is my duty to do so, but I am bound to consider carefully whether that is the result of the Act. In my judgment it is not, and for this simple reason, that I cannot come to the conclusion that the fund in Court is "property recovered or preserved" within the meaning of the Act.

(1) 4 Q. B. D. 245, 525 ; 5 App. Cas. 214.

(2) 11 C. B. 755.

(3) 8 Ch. D. 479.



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At the time when the trustee intervened the money had been paid in by the Defendant, and the then Plaintiff *Emden* had applied for an order to take the money out of Court. The result of such an order would, I have no doubt, have been, that he would have put the money into his pocket and applied it for his own purposes. Was that money which Mr. *Emden* was endeavouring thus to snatch from his trustee "money preserved" for the trustee within the meaning of the Act? It is just the same thing as if, *A.* being in possession of money to which *B.* is entitled, *C.* snatches it from *A.* *C.* is overtaken by *B.* and the money is rescued from *C.* Has that money been preserved by *C.* for *B.*? It seems to me that there is no preservation at all. On the contrary, instead of its being preserved, it was exposed to the imminent hazard of *Emden* pocketing the money before the trustee intervened.

I cannot bring myself to think that the money which Mr. *Emden* thus endeavoured to obtain, and which, as between himself and his trustee, he had no right to obtain, and which he would have got, but for the intervention of the trustee at that moment of time, was property—money—which was preserved within the meaning of the statute. I must therefore refuse this application with costs, including the costs of the Defendant.

But, as the trustee has offered to allow Mr. *Emden's* solicitor to have a charge for his costs incurred in the suit down to the time of payment into Court, and as Mr. *Turner*, as I understand, renews the offer at the Bar, notwithstanding this application, I will by his consent make an order accordingly. If the offer is not accepted, I shall dismiss the summons with costs. The applicant must determine within four days whether he will accept or refuse the trustee's offer.

The offer was declined by the applicant; and the summons was accordingly dismissed.

W. L. C.

From this order the solicitor for the bankrupt appealed. The appeal was heard on the 3rd of November, 1881. C. A.

*Beddall* (*Cookson*, Q.C., with him), for the Appellant, relied on the same arguments as in the Court below, and further contended

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that, even if the Appellant were not entitled to a charge for all the costs, he was entitled to a charge for so much of them as was incurred before the intervention of the trustee: *Berdan v. Greenwood* (1); *Hawkesley v. Bradshaw* (2); *Clover v. Adams* (3).

*J. Pearson, Q.C., and F. Turner, for the trustee in bankruptcy.*

*Everitt, for the Defendant.*

JESSEL, M.R.:—

This is an appeal from Mr. Justice *Fry*, who appears to me to have decided that a sum of money paid into Court in this action was not money recovered or preserved within the meaning of the *Attorney and Solicitors Act, 1860*. And he seems to have been led to that conclusion by the extraordinary result which would have followed on deciding it the other way if he adopted the literal wording of the 28th section of the Act of Parliament and acceded to Mr. *Beddall's* argument, that he was bound to declare a charge which would have entitled the solicitor to all the costs of the action whether properly or improperly incurred—whether incurred in recovering the property or in resisting the claims of persons entitled to the property,—certainly a result which would have been so remarkably absurd that I could imagine a Judge resorting to almost any mode of construction which could prevent its being adopted.

It appears to me, however, that the property was recovered within the meaning of the Act of Parliament, and that the Act of Parliament is capable of a rational construction, though, like many other Acts of Parliament, not quite so well worded as it might have been.

The first point to be considered is what is the real character of money when it has been paid into Court in an action by a defendant who at the same time denies entirely his liability to the plaintiff? Of course, it is obviously inconsistent to say, on the one hand, “I admit I am liable to you for so many hundreds of pounds,” and, on the other, to say, “I deny my liability alto-

(1) 3 Ex. D. 251.

(2) 5 Q. B. D. 302.

(3) 6 Q. B. D. 622.

gether." But, though inconsistent, that is a mode of pleading which is now permissible under the *Judicature Act*, and, as has been pointed out by the late lamented Lord Justice *Thesiger* in *Berdan v. Greenwood* (1), it is quite intelligible that a man may say, "I am under no liability to you, but I am willing to pay you a sum of money if you abandon your claim;" and that mode of pleading enables a defendant so to say. But when he says it the legal consequences, as gathered from that judgment, are exactly the same as if it had been a pure admission of liability—the plaintiff has a right to take the money out of Court, and to keep it, whether it is paid as a simple admission of liability (in which case, of course, he would be entitled to keep it) or paid in in the nature of a payment of, as it is sometimes called, "black mail," to get rid of the trouble or the expense of the action. In either case it is paid in, and there is an end of it, and the plaintiff has the right to take it out of Court and to keep it as his own.

Then, as has been said, if the plaintiff has a sum of money in Court which belongs to him, which he has only to ask for in order to get it, surely it is his property. It is property recovered by him or preserved for him in the Court of Justice, and it does appear to me that there is no fair interpretation reasonably possible to be given to the words "recovered or preserved" which will not apply to money in this position. I am, therefore, of opinion that the ground upon which the learned Judge proceeded in the Court below, that this was not within the terms of the Act of Parliament, cannot be supported.

Well, that being so, the next point which was urged before us—rather to my surprise, having made many of these orders at the Rolls—was that the Judge was bound simply to make an order establishing the charge which would entitle the solicitor to all costs, whether properly incurred or not. The words of the Act of Parliament, as I said before, are not quite so accurate as they might have been. All that the section says is, "It shall be lawful for the Court or Judge to declare such attorney or solicitor entitled to a charge on the property recovered or preserved." It does not say what for. As that stands it is simply absurd, and of course you must apply some words. It does not even say "by

(1) 3 Ex. D. 251.

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whom." It is simply "property recovered or preserved" in the suit, and I was very much surprised to hear it argued that those words "It shall be lawful" did not give the Judge any discretion; that would be more absurd still, if that were possible. The words are simply "on the property recovered or preserved." Of course, it means only on property recovered or preserved through the instrumentality of the solicitor, and there are subsequent words which shew that is the meaning. Then what is he to have a charge for? It says, "entitled to a charge," and there it stops. It does say that some consequences are to follow about costs, when he is entitled to the charge. But obviously it means that he is entitled to some costs due to him; what costs the Judge is to direct. Therefore he is to declare that he is entitled to a charge for some costs. But then it goes on to say, "Upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property of whatsoever nature, tenure, or kind the same may be which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor"—that shews at once that the first part is limited to such cases—"for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding." It does not say whose taxed costs—it does not say even the taxed costs of the solicitor, but it must mean that. It cannot mean that he is to have a charge for the taxed costs of other people, but it must mean the taxed costs of himself. Then it says, "Of or in reference to such suit, matter, or proceeding." Does that mean every possible costs, whether properly incurred or not? It would be making nonsense of a sensible provision which was intended to be a remedial provision in favour of solicitors who had recovered or preserved property for their clients. Of course it must be costs properly incurred, and it is the duty of the Judge in making an order to limit the order to the costs properly incurred, and to direct taxation of the costs properly incurred.

The result in this case of making an order in the terms asked for would have been, as was pointed out by Mr. Justice *Fry*, to commit a gross injustice. An uncertificated bankrupt had brought an action to recover money for work done prior to the



bankruptcy and subsequent to it, but before he was discharged, money which it has been decided belongs to the trustee under the bankruptcy for the benefit of the creditors. When the trustee heard of the action he proceeded to intervene and endeavoured to get—what he ultimately obtained—the control over the proceedings and an order for the conduct of those proceedings.

The bankrupt, by means of the assistance of the solicitor, resisted the application of the trustee, which was ultimately successful, and endeavoured to prevent the trustee obtaining either the money or any benefit from the action. He failed in that resistance, and actually it was thought right, prudent, and discreet to ask a Court of Justice so to construe the Act of Parliament as to give the solicitor of the bankrupt the costs of opposing the application of the trustee to recover the money or the benefit of the action for the creditors, which would have been the effect of making merely a charging order and giving him all the costs. Under those circumstances the Judge decided against the applicant, and ordered him to pay the costs of the application. It does not appear to me that, however extravagant the claim may have been, that was a right order to make. The Judge ought to have made an order giving him a charge up to that point when the trustee intervened. The trustee took the benefit of the action by adopting it, and, therefore, ought to pay the costs of the solicitor who had instituted the action and brought it to a point at which it was worth adopting. The date of that, as I understand, is the 26th of November. Therefore, I think the order should be discharged except as to the costs of the Defendant, against which part of the order there has been no appeal, and the charge should be declared on the money in question for the costs of the Plaintiff up to and including the 26th day of November, with the usual directions as to taxation; and I think (considering all the circumstances of the case which I would rather avoid dwelling upon in detail any further) justice will be done by making no order as to costs, either in the Court below or in this Court.

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BAGGALLAY, L.J.:—

The action in which this appeal is brought was commenced by

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the Plaintiff, in June, 1880, to recover remuneration for services rendered by him as an architect, and damages for wrongful dismissal. The statement of defence, first of all, denied liability, and it alleged that if there was a liability the sum of £360 10s. was sufficient to meet it; and that amount was paid into Court the day after the defence was filed. *Berdan v. Greenwood* (1), which was followed in *Hawkesley v. Bradshaw* (2), established that that form of pleading might properly be had recourse to, and indicated what the effect of it would be. After money was so paid in it was open to the Plaintiff, at his own option and discretion, either to take the money out of Court in full satisfaction of the demand made by him in the action, (in which case he would tax his costs and sign judgment in the usual way), or to take it out of Court, and go on with the action for the purpose of seeing whether he could recover a larger sum than the amount paid into Court; and, in the event of his so taking the money out of Court, and going on with the action, and of there being eventually a judgment in the Defendant's favour, either by reason of there being no liability or arising out of the fact of the money [paid into Court being in excess of the amount the Plaintiff was entitled to, the Plaintiff's right to retain that money would be clear, and it would be property "recovered or preserved in the action" within the meaning of the *Solicitors Act*. Therefore, if this case had not been affected by the circumstances arising out of the bankruptcy of the Plaintiff, the right of the solicitor making the present application would have been clear. But it appears that the Plaintiff was an uncertificated bankrupt at the time when he commenced the action. It does not appear whether the present Appellant was aware of that fact at the time when the action was commenced, but the view which Mr. Justice *Fry* seems to have taken of the case was this, that, inasmuch as this was an action brought to recover money by *Emden* to which *Emden* was not entitled, but which at the time belonged to *Emden's* trustee, the money when paid into Court was by reason of that circumstance not money recovered or preserved by the action, inasmuch as it was money belonging to somebody else. That I understand to be the gist of the judgment of Mr. Justice *Fry*. But I am bound to say I am unable to take that view

(1) 3 Ex. D. 251.

(2) 5 Q. B. D. 302.

of the case. The trustee intervenes in the action; he comes in and takes the benefit of the action, and what he ultimately may recover in this action will be the fruit of an action commenced originally by *Emden* through the solicitor who is the present applicant. Therefore it appears to me that down to such time as the trustee intervened and took the conduct of the proceedings in the action, there is no reason why the solicitor should be deprived of the charge for costs to which he would have been entitled had there been no intervention on the part of the trustee at all; but the period down to which he is entitled to such costs must be limited to the date of the intervention. As regards costs one party has asked too much and the other has offered too little, and I think the justice of the case will be met by what the Master of the Rolls proposes, namely, that there should be no costs here or in the Court below so far as regards the parties before us on the present occasion.

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BRETT, L.J.:—

In this case the solicitor applied for a charging order on the fund of £360, and it seems to me that the learned Judge refused to make such an order, as a matter of right, altogether. The only question is whether that refusal of the learned Judge is a correct decision according to law. It was suggested at the commencement of the argument that it was a right refusal on the ground that this £360 was not a sum recovered or preserved within the meaning of the *Solicitors Act*. With regard to that question—I think it was rather suggested by the Court than by the counsel; certainly it was not the ground of the decision of Mr. Justice *Fry*—it struck some of us at first (the cases not being within our immediate recollection) that it was difficult to say, where there is this alternative mode of pleading in which the Defendant is allowed to pay money into Court and at the same time to deny the liability, that the sum was a sum “recovered or preserved”; but the case of *Berdan v. Greenwood* (1) being cited, it seems to me that that case did judicially decide that such an alternative and inconsistent mode of pleading is now to be allowed, and that with regard to so much of that pleading as concerned

(1) 3 Ex. D. 251.

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the effect of the payment into Court is to be precisely the same as a payment into Court was before the *Judicature Act*; that is to say, that if a defendant will pay money into Court, although at the same time he denies his liability, nevertheless the plaintiff is entitled to take that money out of Court; and if the defendant afterwards succeeds upon the question of liability, nevertheless the plaintiff is entitled to keep the money taken out of Court. As Lord Justice *Thesiger*, in the judgment which was the judgment of the whole Court although delivered by him, says, as the opinion of the whole Court (1): "The record only shews that the plaintiff has obtained through the timidity of the defendant something which he had no right to obtain;" that is to say, that by the bringing of the action and the timidity of the defendant in submitting to it, the money is recovered or preserved by the exertions of the plaintiff's solicitor. Therefore, if it had not been for the complication introduced into this case by the bankruptcy, the decision in *Berdan v. Greenwood* (2), which was necessarily followed in the subsequent case, because *Berdan v. Greenwood* is a decision of the Court of Appeal, would have been a distinct authority for saying that this money, notwithstanding the alternative pleading, is money recovered by the Plaintiff in the action by reason of the exertions of his solicitor, and that therefore the charge was a charge which would have been properly allowed.

But then there came the question whether this order ought to have been made with regard to money which really was money that would go to the trustee. The solicitor had acted for the Plaintiff, and the trustee had come in. Now, under that state of circumstances this solicitor, by his counsel, insisted on asking for an order in respect of the costs incurred in the action—not only the costs incurred in respect of obtaining the money, but in resisting the claim of the trustee. That application, and the insistence upon it in argument by reason of a suggested interpretation of the *Solicitors Act*, did certainly produce, or would have produced, in truth a result so unjust that the Judge saw that the construction of the Act of Parliament insisted upon could not be the right construction. In that respect I agree with him. I think that the suggested interpretation was wrong, for the reason which my Lord

(1) 3 Ex. D. 257.

(2) 3 Ex. D. 251.



the Master of the Rolls gave. But then the learned Judge seems to me inadvertently, because the point was not taken before him—as so often happens, and which is the cause of most of the differences which have arisen when differences have arisen between this Court of Appeal and learned Judges of first instance—to have concluded that because the order asked for was a wrong order and could not be made, therefore he could not make any order at all. It might be said that by the argument the learned Judge was misled into that inadvertent conclusion, but then I think the duty of a Judge is much higher than such an argument would suggest. The learned Judge is partly misled by a fallacious argument, but, as I said during the argument, it is his duty to see through fallacies, and further, it is the duty of the Judge to take all the points which the case fairly raises, although those points are not taken by the counsel. I think, with great deference, and I believe the learned Judge would say so himself the moment it was called to his attention, it was an erroneous conclusion to say that because he could not make the unjust order which was asked for, therefore he could not make any order at all, yet it seems to me that by his judgment he did judicially decide that on the interpretation of the *Solicitors Act* he could not in this case make any order at all. I think, with great deference, and I believe he would have thought so himself if it had been called to his attention, that he could have made an order for a charge in respect of the costs incurred up to the time when the trustee intervened. No doubt the solicitor was not up to that time acting for the trustee, but the trustee will obtain the money by reason of the exertions of the solicitor before the time when the solicitor can be said to have been acting for him, and therefore he ought only to obtain the money, the result of those exertions, subject to the fair payment to the solicitor of the costs properly incurred as against him in so preserving or recovering the money. This order, therefore, ought to be as has been suggested.

With regard to the question of either party paying costs, all the other learned Judges of the Court being of opinion that there ought to be costs on neither side, I shall certainly not venture to differ from them on such a point.

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I am of the same opinion, and I will add a very few words. The practical result of paying money into Court in the alternative way in which the money was paid in here will be found worked out in the judgment of Lord Justice *Thesiger* in *Berdan v. Greenwood* (1), and, as I understand it, it comes to this, that the plaintiff can get the money so paid in. He can take it in one of two ways. He can either take it in satisfaction and tax his costs, which puts an end to the action; or he can, if he likes, take it and go on and try and get more. If he goes on and tries to get more he must prove two things: he must prove the defendant's liability, and he must prove that the money paid in is not sufficient. If he succeeds in this he retains the money taken out and recovers more and his costs; but if he fails it seems from the decision referred to that he can nevertheless retain what he has got already, the defendant having risked his chance of what might happen if he paid it into Court in that particular way. If that is the true view it seems to follow as a matter of course that the money is recovered and preserved in the action in which it is paid in. So far there seems to be no difficulty. But then in this case there was a change of plaintiffs, the trustee being added as co-plaintiff. The trustee, taking the benefit of all the proceedings in the action by the uncertificated bankrupt, stands in the same position as the uncertificated bankrupt as regards costs. The present application is by the solicitor of the original plaintiff for a charge under the *Solicitors Act* for his costs in recovering this sum of money which was paid into Court. The Defendant never opposed that at all, and therefore we need not discuss any question as to whether he could or could not oppose it. He never objected in any way, and the whole contest was between the solicitor of the original plaintiff and the trustee. Subject to a very slight alteration in the date, it appears to me that what took place in Chambers was as nearly right as could be. The Chief Clerk proposed to do almost the very thing which this Court thinks was right. The only difference between the view taken by the Chief Clerk and this Court is that this Court gives the solicitor

(1) 3 Ex. D. 251.

his costs down to a few days later. But the applicant, Mr. *Beddall's* client, was not content with that order of the Chief Clerk. He would not have it. It was as nearly as possible all that he was entitled to, but he would not have it, and he went to Mr. Justice *Fry* to get more. In attempting to get more it became plain that if he obtained the order he wanted this most startling result would follow, namely, that the solicitor would get the costs of improperly opposing the claim of the trustee to the sum of money and other matters in the action. That was so obviously wrong that there was a re-action, and Mr. Justice *Fry*, bearing in mind that the Plaintiff was appealing from an order which substantially gave him all that he was entitled to, dismissed his application with costs. This was going too far. But upon the question of costs it strikes me that the Appellant has nobody but himself to thank for the result. He brought it on entirely by his own conduct, and all we have to do now is to put the order in the form in which it ought to be, which is substantially what it was in Chambers, merely varying the date by a few days, and giving neither party costs.

Solicitor for Bankrupt: *F. C. Tudor*.

Solicitor for Trustee: *J. J. Winser*.

Solicitors for Defendant: *Beyfus & Beyfus*.

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## HEATLEY v. NEWTON.

[1881 H. 1649.]

*Practice—Motion to Judge to discharge Order made by him in Chambers—  
Time within which such Motion may be brought—Judicature Act, 1873,  
s. 50—Rules of Court, 1875, Order LVIII., r. 15—Suit to rescind Contract  
—Auctioneers made Parties—Staying Proceedings.*

244D302 A motion to a Judge in Court under the *Judicature Act*, 1873, s. 50, to discharge an order made by him in Chambers may be made at any time within twenty-one days from the drawing up of the order unless the order is simply a refusal of an application, in which case the twenty-one days must be reckoned from the refusal.

The Plaintiff, who had bought property at an auction and paid a deposit to the auctioneers, brought an action against the vendors and the auctioneers to have the contract rescinded, the deposit repaid with interest, the costs of the action paid, and for damages. The statement of claim alleged that all, or nearly all, of the biddings previous to that of the Plaintiff were fictitious, and were either biddings by the vendors or their agents, or were announced by the auctioneer without any bidding having in fact been made. The auctioneers applied for liberty to pay the deposit into Court, and to have the action dismissed against them on such payment being made. The Master of the Rolls made an order that, the vendors undertaking to pay the auctioneers their costs of the action without prejudice to how they should ultimately be borne, and to pay any interest and damages to which the Plaintiff might be held entitled, and the auctioneers undertaking, in the event of the vendors not carrying out their undertaking, to pay to the Plaintiff interest on the deposit up to the time of payment into Court, and the costs of the action up to and including that application in the event of the Court holding the Plaintiff entitled to such interest and costs, the auctioneers should be at liberty to pay the deposit into Court, and that all further proceedings against them should be stayed:—

*Held*, on appeal, that the order must be discharged, the auctioneers not having submitted to give the Plaintiff all the relief which he could in any event be entitled to against them, for that if the allegations in the statement of claim were established the Plaintiff would be entitled to have judgment against them for the deposit with interest, and to have an order for costs of the action against all the Defendants.

THE Plaintiffs, *Heatley* and *Last*, by their statement of claim, alleged to the following effect:—That on the 6th of April, 1881, the Defendants *Newton* and *Latouche* put up a leasehold for sale at the auction mart by the Defendants *Fox & Bousfield* as auctioneers. The first conditions of sale provided that, “Subject



to the right which the vendors reserve of bidding once or oftener by themselves or their agent, the highest bidder shall be the purchaser." A deposit of 10 per cent. was to be paid into the hands of the auctioneers.

That *Heatley* was desirous of purchasing, and *Last* attended the sale as his agent for the purpose of bidding. "The said Mr. *Bousfield* put up the premises in the ordinary way, and what appeared to be a very brisk and eager competition between bidders ensued. Ultimately the said Mr. *Bousfield* announced that the biddings had reached the sum of £12,950, and he appeared to be about to knock down the property at that price. He had already said the words 'going, going,' when the Plaintiff *Last* (who up to that time had made no bid at all) being induced by the language and manner of the auctioneer to believe that the property was about to be knocked down to a *bonâ fide* bidder at £12,950, bid the sum of £13,000, and there being no subsequent bidding the property was knocked down to him, and he was declared the purchaser thereof at the price of £13,000."

The statement of claim then alleged the signature of the usual agreement, and the payment of the deposit of £1300 to the auctioneers.

"The Plaintiffs have since discovered, and the fact is, that not only was the alleged bid for £12,950 an entirely fictitious bidding, but that almost, if not quite, all the preceding biddings were also fictitious, and that the apparently brisk and eager competition hereinbefore mentioned was occasioned by the vendors and their agents, or some of them, bidding against each other, and running up the price so as to induce the Plaintiff and the other *bonâ fide* attendants at the said auction to believe that there were many persons desirous of purchasing the premises at a far higher price than was actually the fact. There was no *bonâ fide* bidding within five or six thousand pounds of the sum of £12,950. All the numerous biddings or alleged biddings after the sum of £8000 or thereabouts were either biddings by the vendors or their agents or some of them, bidding one against another, or were no biddings at all, and were merely announced by the auctioneers without any bidding having been made. More than one person bid at such auction on behalf of the vendors."

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The Plaintiffs claimed to have the agreement for purchase set aside, that *Fox & Bousfield* might be ordered to repay to the Plaintiffs the £1300 with interest; payment of the costs of the action; damages and further or other relief.

On the 27th of May the Defendants *Fox & Bousfield* took out a summons asking that they might be at liberty to pay the £1300 into Court, and that on such payment being made the action might stand dismissed as against them, and that their costs of the action might be provided for.

On the 23rd of June the Master of the Rolls made in Chambers the following order:—

“The Defendants *Newton* and *Latouche* by their counsel undertaking to pay to the applicants their costs of this action, such costs to be taxed by the Taxing Master, but without prejudice to any question by whom such costs are ultimately to be borne, and also to pay any interest and damages to which the Plaintiffs may be held to be entitled, and the applicants by their counsel undertaking, in the event of their co-Defendants not carrying out their said undertaking, to pay to the Plaintiffs interest up to the date of the payment into Court hereinafter mentioned, and also the costs of this action up to and including this application in the event of the Court holding that the Plaintiffs are entitled to such interest and costs, it is ordered that the Defendants *Fox & Bousfield* be at liberty to pay into Court to the credit of *Heatley v. Newton* [1881 H. 1649] £1300 in the Plaintiffs’ claim mentioned, and that thereupon all further proceedings in this action against the Defendants *Fox & Bousfield* be stayed, except so far as may be necessary to enforce their undertaking.”

Before the order was drawn up the Plaintiffs applied to the Master of the Rolls to know whether his Lordship wished for any further hearing. The Master of the Rolls said that unless the Defendant’s solicitors would consent to the summons being adjourned into Court, the Plaintiffs must move to discharge the order. The Defendant’s solicitors did not consent. The drawing up of the order was completed on the 14th of July, and on the 18th of July the Plaintiffs gave notice of motion for the 22nd to discharge it, except so far as it ordered that *Fox & Bousfield* should be at liberty to pay the £1300 into Court.

On the 23rd of June *Newton* and *Latouche* had filed an answer to interrogatories, by which they stated that they believed their solicitors had instructed *Bousfield* to bid at the sale on their behalf in such manner as he should think proper for the purpose of preventing the property from being sold at an undervalue. That they believed that successive biddings were made at the sale by *Bousfield* as their agent, and that *Bousfield* made several successive biddings at the sale, and announced several successive biddings which, except by himself, had not been made. That they believed that the bid of £12,950 was made by *Bousfield* on their behalf. That neither of them attended the sale, and that no person but *Bousfield* was authorized to bid on their behalf. No statement on oath was made by the auctioneers.

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The motion came on for hearing on the 5th of August, 1881.

*Chitty*, Q.C., and *B. B. Rogers*, for the motion.

*Seward Brice*, for the auctioneers.

*J. G. Wood*, for the vendors.

JESSEL, M.R.:—

I am of opinion that this application must be refused, as being out of time. It is my invariable rule that notices of motion to discharge orders made in Chambers must be given within twenty-one days from the time of making the order. Any other rule would be very inconvenient, as orders made in Chambers are very often not drawn up at all.

The Plaintiffs appealed from this decision and from the order of the 23rd of June. The appeal came on for hearing on the 15th of November, 1881.

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*Crossley*, Q.C., and *B. B. Rogers*, for the Appellants.

*J. G. Wood*, for the Defendant, took the preliminary objection that the application to the Master of the Rolls to discharge the order made in Chambers was out of time: *Dickson v. Harrison* (1).

(1) 9 Ch. D. 243.

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*Crossley, contra* :—

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Sect. 50 of the *Judicature Act*, 1873, gives the right to apply to the Judge or a Divisional Court to discharge an order made in Chambers. By that section the application is to be according to the practice of the Division, *i.e.*, in this case of the Chancery Division, not of a particular branch of that Division. The Master of the Rolls may have established a practice in his own Court, but that does not satisfy sect. 50. No practitioner has ever heard of there being a rule in the Chancery Division that the application must in all cases be made within twenty-one days from making the order. The principle of *Dickson v. Harrison* (1) was that the analogy of Order LVIII., rule 15, was to be followed. In that case the order in Chambers was a refusal, so, according to the analogy of rule 15, time would run from making the order. That analogy ought to be followed throughout, and where a substantive order is made the time should run from its being perfected. We could not appeal till the order was drawn up.

[BAGGALLAY, L.J., referred to *Dickson's Case* (2).]

*J. G. Wood*, in reply :—

The Master of the Rolls drew attention to the fact that these orders in Chambers very commonly are not drawn up at all. The practice of the particular branch of the Court in which the order has been made is to be followed.

BAGGALLAY, L.J. :—

The case must be heard on the merits.

LUSH and LINDLEY, L.JJ., concurred.

*Crossley*, Q.C., and *B. B. Rogers*, for the appeal :—

The auctioneers were properly made parties, on the ground that the sale was fraudulent, and that they were parties to the fraud : *Beadles v. Burch* (3) ; *Marshall v. Sladden* (4) ; and we are entitled to keep them before the Court for the purpose of recovering

(1) 9 Ch. D. 243.

(3) 10 Sim. 332.

(2) 12 Ch. D. 298.

(4) 7 Hare 428.



interest on the deposit, for the purpose of making them liable to costs, and for discovery.

[*Ince*, Q.C., referred to *Barnes v. Addy* (1).]

That case is in our favour rather than otherwise. The Master of the Rolls has here taken a short cut, which prevents the case being tried against the auctioneers, and has in effect overruled *Seaton v. Grant* (2). We shall contend at the hearing that an auctioneer cannot be an agent to bid, and that his pretending to receive from all quarters of the room bids which in fact are made by himself is, in the view of a Court of Equity, a fraud. It is without precedent to stay proceedings against one defendant on an undertaking by another. Whatever claim we have against the auctioneers we ought to be left to enforce against them. If we are right, we should get the whole costs of the action against all the Defendants, and we ought not to be left to rely on our remedy against the vendors, of whose solvency we know nothing.

*Ince*, Q.C., and *Seward Brice*, for the auctioneers:—

The Plaintiffs have got by the order all they ever could get against the auctioneers, and the auctioneers ought to be dismissed on the ground on which defendants are dismissed who have submitted to the plaintiffs' demands. *Beadles v. Burch* (3) is no authority in this case, for there some relief was still to be had against the agent. The auctioneers could not be liable to costs subsequent to their submitting to the Plaintiffs' demands, so the Plaintiffs have got all they ever could get against us. Even in the old times the Court considered the practice of making an agent a party objectionable, and one that ought not to be extended: *Marshall v. Sladden* (4); and the later authorities go in the same direction. The Plaintiffs ought not to hamper the vendors with extra costs by making the auctioneers parties; they should have brought separate actions.

[BAGGALLAY, L.J.:—If you had paid the £1300 to the Plaintiffs you would have had a better case for saying that you had submitted to their demands.]

(1) Law Rep. 9 Ch. 244.

(2) Ibid. 2 Ch. 459.

(3) 10 Sim. 332.

(4) 7 Hare 428.

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We could not do so while the vendors were before the Court contesting the right of the Plaintiffs to receive it.

[BAGGALLAY, L.J.:—If all the facts alleged are true the decree would probably be for you to pay the £1300, with interest, to the Plaintiffs, and for all the Defendants jointly and severally to pay the costs of the action.]

Costs are not part of the relief, and the auctioneers ought not to be kept before the Court merely on the ground of liability to costs.

*J. G. Wood*, for the vendors, submitted the point to the Court.

BAGGALLAY, L.J.:—

In this case an auction took place on the 6th of April, at which a certain property was put up for sale, and was in form knocked down to the present Plaintiffs for the sum of £13,000. They have commenced this action against the vendors and the auctioneers, alleging that no real bidding at all took place at the auction; that a number of pretended bids were taken by the auctioneer from time to time; that when the biddings got up to the sum of £12,950 the auctioneer pretended to be about to knock the property down, and had got to the words “going, going”; that thereupon the Plaintiff *Last*, the agent of the Plaintiff *Heatley*, who was attending there for the purpose of bidding but had never made any bid at all, bid the sum of £13,000, and it was knocked down to him; that the whole was a fraudulent arrangement to run up the price; that the auctioneer, as well as the vendors, must be treated as parties to the fraud; and that at all events a fraud was committed by the auctioneer in pretending to receive bids which he never in fact received at all. That is the foundation for the action, which seeks to recover the deposit paid to the auctioneers and to rescind the contract, and asks for costs as against all the Defendants in connection with the relief so sought. It appears to me that, assuming the facts to be as alleged upon the face of the claim, it is quite consistent with the ordinary course of proceeding in the Chancery Division of the Court that the auctioneers should be made parties to the action, not only for the purpose of getting back the £1300 paid to them

as deposit, but also for saddling them conjointly with the other Defendants with the costs of the action. I think that Mr. *Ince* hardly controverted that part of the case, because he got rid very hastily of the authorities which were cited in support of it by saying that they were only authorities justifying the making of the agent a party in the first instance, but did not go the length of saying that the agents may not be let go after a certain time when they have done what they ought to do. The question is, have they done what they ought to do? As I have before said, if the facts were as they are alleged upon the face of the claim, the action would appear to have been properly commenced as against the agents; and although applications have been made to the Court, there has been no denial of the allegations in the statement of claim. Such being the origin of the suit, an application was made to the Court on the 23rd of June (I need not enter into what took place prior to that date) to dismiss the action or stay all proceedings against the Defendants *Fox & Bousfield*, they having brought the £1300 into Court. From the order then made, which was in effect an order dismissing them from the suit, an appeal was made to the Judge in Court on the 5th of August, and on that appeal two points were raised on the part of the Respondents, one that the appeal was too late in point of time, the other that it ought to fail upon the merits.

As regards the first point, the application to the Master of the Rolls was not, in my opinion, too late in point of time, though I regret having to differ from him upon that question. What his Lordship practically had to consider was, whether the twenty-one days within which the appeal should be brought should be computed from the date of the order itself or from the time when the order was drawn up, and he shortly stated it to be his invariable rule that notices of motion to discharge orders made in Chambers must be given within twenty-one days from the date of making the order in Chambers, and not from the date of passing the order. The Appellants rely upon Order LVIII., rule 15, which provides that the time for appealing shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an

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application, from the date of such refusal. That rule relates to appeals from the decision of a Divisional Court or a Court of first instance to the Court of Appeal, and it was contended on the part of the Appellants that the same rule ought by analogy to be applied to the case of an appeal from a Judge in Chambers to a Judge sitting in Court. Such appeals are regulated by the 50th section of the *Judicature Act* of 1873, which provides that an order made by a Judge of the High Court in Chambers may be set aside or discharged by the Judge sitting in Court, "according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned." The appeal then is to be regulated by the course and practice prevailing, not in any individual branch of any Division of the High Court, but in the Division to which the cause or matter is assigned. Now, is there any course or practice, as far as regards the Chancery Division of the High Court, which regulates the period of time within which an appeal must be brought from the Judge in Chambers to the Judge in Court? *Dickson v. Harrison* (1) has been referred to, and the marginal note in that case is perhaps to some extent misleading. It has been generally conceived that the effect of that judgment was that in all cases of appeal from the Judge in Chambers to the Judge in Court the twenty-one days should be calculated from the day when the order was made and not from the time when the order was perfected, and I was myself under that impression until my attention was more particularly drawn to it. That case, it will be noticed, was a case of a refusal to make an order, and therefore, if the analogy of Order LVIII., rule 15, was adopted, the time would run from the making of the order; and when you turn to the judgments of the learned Judges in that case it will be seen that they did not intend to lay down that in all cases the twenty-one days were to be computed from the day when an order was made, but that, there being no distinct provision as to this matter in the rules of the Court, the Judges in the Chancery Division would adopt by analogy the course pointed out by Order LVIII., rule 15. So, in *Dickson's Case* (2), to which I

(1) 9 Ch. D. 243.

(2) 12 Ch. D. 298.



drew attention during the argument, Mr. Justice *Fry*, in a case not provided for by the *Companies Act*, 1862, adopted by analogy what was provided for by sect. 124 of that Act as to time. So, in *Ex parte Brown* (1), in bankruptcy, the analogy of the rule regulating the time for appealing was followed as to rehearing before the same Judge. I do not think it necessary to go in detail through the judgments in *Dickson v. Harrison* (2), but it will be clearly seen that analogy is the foundation of the judgments of the Master of the Rolls and of Lord Justice *Cotton*, and to some extent also of Lord Justice *Brett*. Acting upon the analogy of rule 15, and what the circumstances in the case then before them required, they came to the conclusion that the twenty-one days were to be calculated from the date of the order. The present is not a case of refusal, but of an order made, and it appears to me that we must now act by analogy to Order LVIII., rule 15; if we apply that analogy, although the order was made more than twenty-one days before the appeal was brought, the application, having been made within twenty-one days from the time when the order was drawn up, was in time.

I will pass on now to the merits. I have already referred to the nature of the action, and pointed out that in its commencement it was properly framed. We have then to consider whether the subsequent circumstances are sufficient to authorize the order from which the present appeal is brought. I may observe that the order which the Master of the Rolls made does not exactly accord with the proposal of Messrs. *Fox & Bousfield*, who took out the summons. They simply asked that upon payment of the sum of £1300 into Court they should be dismissed, and that they should have their costs. The order actually made was this, that upon the money coming into Court, and upon their undertaking to pay the interest on the deposit up to the time of payment into Court, and the costs up to that time, in the event of the Court holding the Plaintiffs to be entitled to such interest and costs, and of the other Defendants failing to pay them, the proceedings should be stayed as against *Fox & Bousfield*. I am bound to say that those provisions do not appear to me to be such as would make the order staying proceedings against Messrs. *Fox & Bousfield* a

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(2) 9 Ch. D. 243.

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proper order. It was the right, as it appears to me, of the Plaintiffs to have them kept before the Court until such time as the Plaintiffs had obtained from them all that could be obtained from them by continuing the suit. Had Messrs. *Fox & Bousfield* repaid the £1300 to the Plaintiffs, and also paid all the costs down to that time, I am by no means disposed to say at the present moment that the order might not have been supported; but that is not what they have done. They have paid the £1300 into Court, but if the suit had gone on to the end, and the facts alleged upon the claim had been substantiated, which for the purpose of the present discussion I must assume, they would have been ordered to pay the £1300, not into Court but to the Plaintiffs, and to have paid the costs to the Plaintiffs. They have actually paid the £1300 into Court, leaving the Plaintiffs to fight for it as best they may against the other Defendants. It is said that these parties are all perfectly solvent, and that there can be no possible risk in letting Messrs. *Fox & Bousfield* go, because the other Defendants will be able to pay everything that may be required of them; but I do not think that the Plaintiffs are bound to accept that position. At the present moment the other Defendants may be perfectly solvent, but they may not be prepared to meet everything recovered against them when the proper time comes, and therefore it appears to me that the Appellants are entitled to have the order discharged.

Another point, upon which I do not feel so clear, was strongly pressed by Mr. *Crossley*, that the Plaintiffs were entitled to keep *Fox & Bousfield* before the Court, apart from any question of personal pecuniary responsibility, upon the ground alone of being able to obtain discovery from them which would enable them to establish their case as against the other Defendants. I am not prepared to admit, as a general principle, that a plaintiff is entitled to have persons kept before the Court as defendants, that they may aid him in obtaining discovery from the other defendants, but here the two things are so mixed up together that, as it appears to me, enough has not been done on the part of Messrs. *Fox & Bousfield*, as regards the Plaintiff's interest, to entitle them to be dismissed from the suit, or to entitle them to have the proceedings stayed against them.

LUSH, L.J. :—

As regards the merits, I am of opinion that this order is one which cannot be sustained. If the statements in the Plaintiff's statement of claim are made out (and it is not unimportant to observe that up to the present time they have never been contradicted), it appears to me that there was abundant ground for making the auctioneers parties to this action with all the consequences of their being so made parties. It alleges that the biddings, which reached the sum of £12,950, and which induced the Plaintiff *Last* to bid £50 more in order to secure the property, he supposing that the biddings were real, were wholly or for the most part fictitious biddings, and that when the auctioneer announced or intimated to the people assembled in the auction-room that he had received a bid from this or that quarter, it was all pretence, that there were either no real bidders at all or only a very few, and that in the majority of the instances in which the auctioneer pretended to have received an intimation of a bidding he had not received one. If that is so, and we must on the present occasion deal with it as a statement to which a contradiction might have been offered and has not been offered, there is abundant ground for making these gentlemen parties to the suit in order that they may become liable to the costs of the suit which the Plaintiffs have been obliged to institute in order to get rid of a contract into which the auctioneers were instrumental in leading them.

Now, the order in question exonerates Messrs. *Fox & Bousfield* from the time they made the payment into Court from all liability except interest and costs up to that time, and it compels the Plaintiff to take the undertaking of the vendors that they will be answerable for all damages to which the Plaintiffs may be held entitled. I do not think that the Court has a right to do this, seeing that the auctioneers were originally properly joined as defendants in the action. I quite agree that you cannot claim to retain parties as defendants in a suit merely because you want to interrogate them; but it appears to me that where they are properly made defendants it is a ground for not letting them off summarily, that there is a very great advantage accruing to the plaintiffs from being at liberty to interrogate them instead of

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simply calling them as witnesses at the trial. We all know that a person who calls a witness at the trial is not allowed to deal with him as if he were being cross-examined, unless the Judge gives leave upon the ground that he appears to be a hostile witness, which is a very different thing from extracting the information before the trial and being able to read the admissions so made. No doubt answers to interrogatories by one of several defendants cannot be read as evidence against the others, but in order to make them evidence he must be called as a witness. On the other hand, we all know what great influence the admission of a co-defendant, especially one standing in the relation in which an agent does to the principal, has upon the conduct of the principal, and I cannot conceive that when these vendors, who say by their answer to interrogatories that they have no knowledge at all on the subject of whether there were mock biddings or not, find out, if they do so find out, by the sworn answer of the auctioneers, that they were mock biddings, that will not have very great influence on them as to whether they will further defend the suit or not. The auctioneers having been properly joined as defendants, it appears to me that the Plaintiffs have a right to say, We will not forego a single advantage to which the presence of these parties as defendants entitled us. I think that on the merits the order is a mistake, for that the Plaintiffs have a right to have these parties as defendants to the suit up to the end, in order, among other things, that they may have their remedy for costs against them. As my learned Brother has observed, it may turn out when the order for costs comes that they are the only solvent parties. I do not mean to insinuate for a moment that the other gentlemen are not solvent, or will not be so, but we must look to possibilities, and we have no right to take away any part of the security which the law gives the Plaintiffs for the costs of the suit if they are awarded in their favour.

Now I come to the technical objection in point of time. Here again I am of opinion that there has been a mistake. The 50th section of the *Judicature Act*, 1873, provides that an order made by a Judge in Chambers may be set aside upon notice by the Judge sitting in Court, "according to the course and practice of the Division of the High Court to which the particular cause or



matter in which the order is made may be assigned." Here application to discharge the order was made within twenty-one days after it was drawn up, but not within twenty-one days after it was pronounced. The question then is, whether it is the course and practice of the Chancery Division of the High Court to confine the power of appealing to the Judge in Court to twenty-one days after the order has been pronounced. It seems to be agreed on all hands that there is no such thing as the course and practice of the Chancery Division as regards the time within which such an appeal may be brought. The learned Judge whose order we are considering, the Master of the Rolls, has adopted the twenty-one days by analogy, as he says expressly in *Dickson v. Harrison* (1), to Order LVIII., rule 15, and this Court has pronounced that period of time to be a reasonable time by analogy to that rule. In *Dickson v. Harrison* the point now before us did not arise, because that was a case in which the appeal was against the refusal of an order; but if we are to take the language of the Master of the Rolls and the Lord Justice Cotton in their ordinary sense, I think that both those learned Judges must be taken to have considered that the analogy ought to be made complete between an appeal to this Court from an order and an appeal from the Judge in Chambers to the Judge in Court; and if so, then, if the order complained of is not a refusal, the twenty-one days ought to be reckoned from the time when it was drawn up, and not from the time when it was pronounced. It does not appear that there has been any settled practice at all on the point. There is nothing whatever to shew that it has been the practice anywhere but at the Rolls to reckon the twenty-one days from the time of the order being pronounced, when the order is not a refusal; and I am by no means satisfied that when the Master of the Rolls dismissed the application it was present to his mind that the order was not a mere refusal, and that the application was made within twenty-one days after the order was drawn up. I am inclined to think, looking at his language in *Dickson v. Harrison*, that if the matter had been present to his mind he would have held that the analogy ought to be made complete, in order to prevent all confusion between an appeal from the Judge in Chambers to the Judge in

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Court, and an appeal from the Judge in Court to this Court. As there is no settled practice, therefore, I think it is highly desirable that we should now lay down, as a general practice of the Chancery Division, that in appeals from the Judge in Chambers to the Judge in Court, the twenty-one days are to be counted as they are in appeals to this Court from interlocutory orders of a Judge—viz., where the order is a substantive order and not a refusal, from the time when the order was drawn up, and not from the time when it was pronounced.

LINDLEY, L.J.:—

I am of the same opinion. With respect to the technical point that the appeal was out of time, the matter stands in this way: The 50th section of the Act of 1873 says that every order made by a Judge of the High Court in Chambers, with certain exceptions, may be “discharged upon notice by any Divisional Court, or by the Judge sitting in Court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned.” I understand that to mean this, that in the Queen’s Bench and Common Pleas and Exchequer Division which existed when this Act came into operation the method of discharging an order made in Chambers would be by notice to the Divisional Court, according to the practice of that Court. In the Chancery Division the method would be by notice to the Judge sitting in Court, according to the practice of the Chancery Division.

If, then, we inquire what the course and practice of the Chancery Division in this matter was, we find that there was not by any order or rule, or by any established practice, any limit of time within which an application should be made to a Judge in Court to review a decision made by him in Chambers; but there was a practice which had sprung up, and which was sanctioned by the Court of Appeal in *Dickson v. Harrison* (1), that the application should be made within twenty-one days; but it was not settled from what time the twenty-one days were to be reckoned. I should have thought, *primâ facie*, that the time ran from the making of the order. That, I believe, was the old rule in Chan-

(1) 9 Ch. D. 243.

cery, and it certainly has been so in Bankruptcy ever since I can recollect; but under the Judicature Acts that is not the rule as regards appeals from interlocutory orders. By Order LVIII., rule 15, the time for appealing from an interlocutory order does not run from the time of making the order except in the case of a refusal to make an order; in other cases it runs from the time when the order is signed, entered, or otherwise perfected. If that is so, and if there is no settled practice except so far as the Court settled it in *Dickson v. Harrison* (1), and if the Court there proceeded, as it did, by analogy to this rule, it would follow that an application to a Judge sitting in Court to review a decision of his own sitting in Chambers ought not to be considered to be too late if it is made twenty-one days after the order is entered. If that is the true view, then the application to the Master of the Rolls in Court to reconsider his order in Chambers was in time, and there is no question about the appeal to us from the order of August being in time. Therefore it appears to me that that technical point ought to be disposed of in favour of the Appellant.

As to the merits, I am of opinion that the order appealed from ought not to have been made. In my judgment the proper order would have been to dismiss Messrs. *Fox & Bousfield's* summons with costs. The case against them was this: the Plaintiff brings an action against the vendors and the auctioneers. He does not make the auctioneers parties to that action simply to ask for costs against them, but if he has any right at all he has a substantive right of action against them, and will have a right to judgment against them for £1300, with interest and costs. If that is so, upon what principle can a defendant in that position say, "I will pay £1300 and interest into Court, and pay the costs of the action up to this time, so let me go." I never heard of such a thing. Any defendant, I apprehend, can stay proceedings in an action upon giving the plaintiff all he asks for as against him, and if Messrs. *Fox & Bousfield* had said to the Plaintiff, "Here is £1300 interest and costs up to this time—let us go," I could understand it; but that is not what they have done nor what they intended to do. What they have done is this: they have paid the £1300 into Court in the hope that it would

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 HEATLEY to you, but we leave you to discuss with the vendors as to who is  
 v. to have it; if you are right you will get it, and if you are wrong  
 NEWTON. the vendors will get it; we have got rid of it and all liability as to  
 Lindley, L.J. the costs of the action subsequently to this time." I am of opinion  
 — that they cannot take this course. They must abide the consequence of that which is alleged to be their wrongful act. If they are wrong they are liable to a judgment for £1300, with interest and costs, and that liability cannot be got rid of by any such process as this. It appears to me on the merits that the Judge was wrong, and the appeal must be allowed.

An order was made discharging the orders of the 5th of August, 1881, and the 23rd of June, 1881, and dismissing the summons. The £1300 to be repaid to *Fox & Bousfield*.

Solicitors for Plaintiff: *Last & Sons*.

Solicitors for Defendants: *Lewin & Co.*; *A. F. & R. W. Tweedie*.

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COLLYER v. ISAACS.

1881

[1881 C. 2253.]

V.-C. H.

June 14.

C. A.

Nov. 16.

*Bill of Sale—After-acquired Chattels—Covenant to assign—Bankruptcy—Liability—Order of Discharge—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 12, 31, 49, 125, sub-s. 10.*

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 116B D 811

A debtor by bill of sale assigned for value to a creditor certain specified chattels at his place of business, "and all other chattels which might be or at any time thereafter be brought thereon in addition to or in substitution thereof." The debtor became bankrupt, and after his order of discharge brought other chattels upon the premises. The creditor did not prove for his debt in the bankruptcy:—

*Held* (reversing the decision of *Hall*, V.C.), that the assignment of the after-acquired chattels, although absolute in form, amounted merely to a contract to assign for the breach of which the assignor incurred a liability provable in his bankruptcy, and from which he was released by the order



of discharge; that consequently the goods brought on the premises after the order of discharge could not be seized by the creditor under his bill of sale.

Whether the same rule applies to a covenant in a marriage settlement to settle future property, *quære*.

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THE Plaintiff, *William Collyer*, in, and for fifteen years prior to the month of April, 1879, carried on the business of an engineer and tool maker at Nos. 21 and 22 *Charles Street, Lambeth*.

On the 25th of April, 1879, the Plaintiff executed a bill of sale whereby he (therein called the mortgagor) assigned to the Defendant *David Isaacs* (therein called the mortgagee), his executors, administrators, and assigns, as a security for a debt of £200 18s. 7d. and an advance of £99 1s. 5d., making together £300, with interest thereon at £10 per cent., "all the goods, chattels, effects, and things enumerated in the schedule hereunder written belonging to the mortgagor, now in or affixed to the messuage and premises Nos. 21 and 22 *Charles Street* aforesaid (the places of business of the said mortgagor), and all other goods, chattels, and effects which may be thereon, or which may at any time hereafter be brought thereon in addition thereto or in substitution thereof, or any of them;" and it was provided that if the mortgagor should pay the mortgagee the sum of £300 and interest by six quarterly instalments each of £50 and interest, the first of which was to be paid on the 4th of August, 1879, then the bill of sale should be void; but if default should be made in the payment of any instalment, or if the said goods, chattels, or effects should be distrained for rent, or the Plaintiff should become bankrupt or any proceedings at law should be commenced against him by writ of summons or otherwise, or the said goods, chattels, and effects should not be insured by the mortgagor, or the same or any part thereof should be removed from off the said premises contrary to the covenants and provisoes thereafter contained, then the mortgagee, his executors, administrators, and assigns might "at any time afterwards enter into and upon the said messuage premises at 21 and 22 *Charles Street* aforesaid, or any other messuage, tenement, or place where the same goods, chattels, and effects shall then be, and take possession of and thenceforth hold and enjoy the said goods, chattels, and effects . . . and may remove or not

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remove the same at their or his discretion . . . and also may, with or without the concurrence of the mortgagee, his executors or administrators, at any time after such default, absolutely sell the said goods, chattels, and effects by public auction or private contract." The bill of sale also contained, *inter alia*, a covenant by the mortgagor not to remove or allow to be removed any part of the said goods, chattels, and effects from the premises without the consent of the mortgagee, his executors, administrators, and assigns for such purpose first obtained. The chattels enumerated in the schedule were a steam-engine, a boiler, a drilling machine, and three large lathes; and the bill of sale was duly registered. On the 16th of February, 1880, the Plaintiff instituted proceedings in the Court of Bankruptcy for the liquidation of his affairs by arrangement or composition, and in April, 1880, he obtained his certificate of discharge. At this time neither of the three instalments which had become due under the bill of sale had been paid, but the Defendant, being content to rely upon his security, did not come in and prove for his debt under the liquidation. After his discharge the Plaintiff discontinued his business of an engineer and tool maker, without however removing the plant included in the bill of sale, and commenced a new business, viz., that of a billiard slate manufacturer, for the purposes of which he purchased certain slate-rubbing benches and other plant and implements. This new business the Plaintiff carried on until May, 1881, when, none of the instalments under the bill of sale having been paid, the Defendant entered upon the Plaintiff's premises and, in exercise of his powers under the bill of sale, seized not only the chattels enumerated in the schedule thereto, but also the slate-rubbing benches, plant, and effects purchased by the Plaintiff for his new business after his certificate of discharge, and advertised the whole for sale by auction upon the premises. The Plaintiff then brought this action for an injunction to restrain the Defendant from continuing in possession of the slate-rubbing benches, plant, and effects, and from advertising or selling them or any other effects by public auction on the premises, and for damages; and he now moved accordingly.

The motion was heard on the 14th of June, 1881, before Vice-Chancellor *Hall*.

*W. Pearson, Q.C., and E. Cutler, for the Plaintiff:—*

First, the security does not in terms authorize the mortgagee to hold a sale by auction upon the premises of the mortgagor, and we are clearly entitled to an injunction to restrain the Defendant from so selling any chattels whatever. Secondly, we are entitled to an injunction to restrain him from selling the chattels acquired by the Plaintiff for the purpose of his new business after obtaining his discharge; because the order of discharge in liquidation (which, under the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71, s. 125, sub-s. 10), has the same effect as a discharge in bankruptcy) releases the debtor from all debts provable under the bankruptcy, and the debt being gone, no property acquired after the debt ceased to exist can be made available to secure it: *Thompson v. Cohen* (1); *Cole v. Kernot* (2). It is true that in the first of those cases there was only a license to seize the after-acquired chattels, but in the second there was an assignment of after-acquired chattels; and as a matter of principle the value of the discharge in bankruptcy would be impaired, and its object, which is to give the debtor a fresh start, would be defeated if such securities were held to comprise property acquired by him after he had obtained his order.

[They also referred to *Carr v. Aeraman* (3).]

*E. W. Byrne, for the Defendant:—*

This is not a mere license to seize or an agreement to assign after-acquired goods, but an absolute assignment of such goods; and where after-acquired chattels are absolutely assigned, if they are described so as to be capable of being identified, such assignment is valid not only in equity but at law; and these chattels were made sufficiently specific by being brought on the premises in addition to or in substitution for the chattels specified in the schedule: *Lazarus v. Andrade* (4); *Leatham v. Amor* (5). These chattels then being comprised in the Defendant's security, remain liable to its operation, although the Plaintiff has himself been

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(1) Law Rep. 7 Q. B. 527.

(3) 11 Ex. 566.

(2) Ibid. 534, n.

(4) 5 C. P. D. 318.

(5) 47 L. J. (Q.B.) 581.

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discharged from his personal obligation and cannot be sued for the debt: *Lyde v. Mynn* (1).

The cases of *Thompson v. Cohen* (2) and *Cole v. Kernot* (3) were decided before the *Judicature Act* placed legal and equitable assignments on the same footing; and, moreover, the decisions in those cases were only directed to the effect of a license to seize after-acquired goods—that in *Thompson v. Cohen* being that where the debt was gone the collateral license to seize had gone with it, while the case of *Cole v. Kernot* was treated as being identical in principle.

[He also referred to the *Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), s. 4, and *Holroyd v. Marshall* (4).]

*W. Pearson*, in reply.

HALL, V.C.:—

Upon the first question as to the injunction asked for to restrain a sale upon the premises, it seems to me that this security is not framed in such a way as to authorize any sale being effected upon premises even of the property which was in the possession of the debtor at the time when this assignment was made. It contains an authority for the mortgagee to take possession of, and thereafter to hold and enjoy, the goods, chattels, and effects, and to “remove or not to remove the same at his discretion;” but it contains no authority to sell the chattels upon the premises, or to hold an auction upon the premises, so as, to that extent and for that purpose, to divest the debtor of the possession of the premises for the purpose of giving effect to the security. That being so, it appears to me that the Plaintiff is right in respect of that portion of his case.

As regards the other point in the case, the question for decision appears to me to be one of considerable difficulty. The frame of the deed is a transfer of all chattels which were then on the premises, or which might be thereon, or which might at any time thereafter be brought thereon in addition thereto or in substitution thereof.

(1) 4 Sim. 505; 1 My. & K. 683.

(2) Law Rep. 7 Q. B. 527.

(3) Law Rep. 7 Q. B. 534, n.

(4) 10 H. L. C. 191. *9 June 45. 215*



That language is unlimited in point of time so long as the relations between the two parties to the instrument subsist. In terms the security extends to the property which is at the time thereon, or which at any time thereafter may be thereon. The debtor takes proceedings for the purpose of liquidating his affairs in bankruptcy. Whatever he had at the time, subject to the rights of secured creditors, passed to the trustee in bankruptcy; and as to the property which he had at that time there is no question that the secured creditor has his security. What is in contest is as to the property which the debtor, who became a liquidating debtor, acquired after the time when he got his discharge; and the question is, whether that property is or is not included in the security for the benefit of the secured creditor. In terms the security extends to and includes it; it is there on the premises, and has, within the meaning of the instrument, been brought on the premises "in addition to or substitution for" chattels thereon at the time of the assignment. But notwithstanding that this after-acquired property is covered by the terms of the deed, the debtor says, the debt itself having gone, the creditor must thenceforth and from that time be secured, not upon what he (the debtor) has brought upon the land, so as to fall within the terms of the security, but only upon what was there at the time when he got his discharge.

Now upon that point the authorities which have been referred to do not apparently dispose of the question.

The contention that the discharge from the debt has the effect of limiting the security so that it should not comprise what, according to its terms, it does comprise—particularly seeing that the debtor has the option of bringing the property on the premises so as to fall within the security, or of not bringing it there at all, and that the property brought on the premises should be distinguished from what was already there by reason of the extinction of the security so far as the debt is concerned—involves a process of reasoning which I confess I cannot quite follow. I have not been referred to anything in the *Bankruptcy Act* which gives it such an operation, nor, upon general reasoning, do I consider that it has been shewn that the security ought to be dealt with in that way. Authorities have been referred to, and particularly the case

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of *Cole v. Kernot* (1), reported in the note to *Thompson v. Cohen* (2). In that case, no doubt, there was an assignment of "all and singular the household furniture, stock-in-trade, goods, &c., which are now or which may during the continuance of the security, by substitution or otherwise, be in and about or belonging to the messuages and premises occupied by" the plaintiff. Mr. Justice *Willes* in that case directed the jury that the defendant had no right under his bill of sale to seize any property acquired by the plaintiff since his order of discharge, and expressed it as his impression that the effect of the plaintiff's discharge in bankruptcy was to get rid of the collateral security for the debt which was absolutely barred by the order of discharge in bankruptcy.

That general proposition is manifestly a great deal too wide. The security itself was in the terms which I have mentioned, and in the argument the counsel who supported the rule contended "that the authority to seize being given for a good consideration, was irrevocable; the bankrupt was discharged from the debt, but the debt was not extinguished, and if the debt still existed then there was a default within the terms of the deed, although the debtor was only morally bound and not legally; that the security remained although the debt was barred by the bankruptcy."

The Court discharged the rule, and Mr. Justice *Mellor*, in his judgment in *Thompson v. Cohen*, after saying that he had nothing to add to the judgment of Mr. Justice *Blackburn*, continued (3): "But I have to say that we have considered the case of *Cole v. Kernot*, together with this case, and the Court are all satisfied that the two cases are identical in principle, and the rule, therefore, in that case must be discharged."

Then Mr. Justice *Blackburn* says (4), "The case is distinguishable from *Lyde v. Mynn* (5), which was much pressed, and properly pressed, upon us. In the present case the mortgagor, having executed the above deed, filed a petition for liquidation, which, as I have already said, had the same effect as if he had become a bankrupt, and by operation of the liquidation he was discharged from the debt altogether—the debt was in fact gone;" and in his

(1) Law Rep. 7 Q. B. 534, n.

(2) *Ibid.* 527.

(3) Law Rep. 7 Q. B. 533.

(4) *Ibid.* 532.

(5) 4 Sim. 505; 1 My. & K. 683.

judgment Mr. Justice *Blackburn* dealt with *Lyde v. Mynn* (1), and said that, "It is sufficient to say that the precise point does not arise in the present case, as there is no covenant to transfer, or anything amounting to an equitable mortgage, like the case of *Holroyd v. Marshall* (2). Here is a simple license to seize after-acquired goods for the purpose of selling them and discharging the debt, and the debt being gone, we think the collateral license to seize goes with the principal debt. There must, therefore, be judgment for the plaintiff."

*Lyde v. Mynn* was a case which was decided by the Vice-Chancellor *Shadwell*, and afterwards by Lord *Brougham*, who thought that the covenant in that case was not discharged by the bankruptcy. If that was the law as applicable to that case, I do not understand why it is not the law as applicable to the case now before the Court, notwithstanding that Mr. Justice *Blackburn* thought fit to distinguish it. In spite of the authority of Mr. Justice *Blackburn* in favour of the proposition, I do not see my way to limit the security to what was actually comprised in the assignment at the time of the discharge. The debtor has given this security in terms expressly extending to what he has brought upon the premises, and that being so, the security remains for whatever was comprised within it, except so far as it may have been varied. I do not see my way to limit the security as is contended for.

It is manifest that these cases have been considered and dealt with in the way they have, by reason of the different views taken by Courts of Equity and Courts of Law as to the operation of instruments dealing with non-existent property—the Courts of Law refusing to admit its existence for the purposes of transfer, while the Courts of Equity have dealt with these cases as being transfers of property as effectual for non-existing as they were for existing property. It appears to me, therefore, that the Plaintiff has not made out that he is entitled to have the sale restrained as to chattels brought on to the premises by himself since he obtained his order of discharge.

T. F. M.

The Plaintiff appealed from so much of the judgment as refused

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(1) 4 Sim. 505; 1 My. & K. 683.

(2) 10 H. L. C. 191.

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to restrain the Defendant from seizing under his bill of sale the goods brought on to the premises by the Plaintiff after the order of discharge.

The appeal was heard on the 16th of November, 1881.

*E. Cutler* (*R. Vaughan Williams* with him), for the Appellant:—

The refusal of the Vice-Chancellor to restrain the Defendant from dealing with the after-acquired chattels was clearly wrong. An assignment of goods to be brought upon the premises is ineffectual to bind goods brought upon the premises after the discharge in the liquidation of the assignor.

An assignment of chattels to be hereafter brought on the premises cannot be more than a contract to assign; it does not constitute the assignee a creditor having a security on the bankrupt's estate within the latter part of sect. 12, but it is only a liability on the assignor's part, which is a debt provable under sect. 31, and, as such, is barred by his order of discharge under sect. 49. These after-acquired chattels were not acquired by nor devolved upon the bankrupt during the continuance of the bankruptcy, and do not form part of the bankrupt's property within sect. 15, sub-sect. 3.

When the case of *Lyde v. Mynn* (1) was decided only a money debt could be proved in bankruptcy; the Act did not make a liability provable.

[They referred to *Thompson v. Cohen* (2); *Cole v. Kernot* (3); *Holroyd v. Marshall* (4).]

*E. W. Byrne*, for the Respondent, repeated the argument relied on in the Court below, and in addition to the cases previously cited, cited *Ex parte Pain* (5), where the claim of the provisional assignee under the previous insolvency of the debtor was held not to be defeated by the order of discharge obtained by the debtor in a subsequent bankruptcy.

[JESSEL, M.R.:—That decision depended on sect. 161 of the *Bankruptcy Act*, 1861.]

(1) 4 Sim. 505; 1 My. & K. 683.

(2) Law Rep. 7 Q. B. 527.

(3) Law Rep. 7 Q. B. 534, n.

(4) 10 H. L. C. 191.

(5) Law Rep. 3 Ch. 639, 641.

*9 Jan 452/13.*



JESSEL, M.R. :—

This is an appeal from a decision of Vice-Chancellor *Hall*, and it raises certain important questions as to the effect of the *Bankruptcy Act*.

The case is shortly this: A debtor executed a mortgage security to his creditor which contained in form an assignment of all future chattels which should be brought upon certain premises. Then the debtor liquidated, and obtained his discharge. The debtor, after his discharge, brought other chattels on to the premises, and the creditor claimed those chattels under his mortgage security. The debtor brought this action to prevent, by injunction, his creditor selling the after-acquired chattels, and the Vice-Chancellor has decided in favour of the creditor. I must say that this decision appears to me to be contrary not only to the meaning but to the express words of the Act of Parliament.

We must first consider what was the position of the parties before the liquidation proceedings. The creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. If a person contract for value, *e.g.*, in his marriage settlement, to settle all such real estate as his father shall leave him by will, or purports actually to convey by the deed all such real estate, the effect is the same. It is a contract for value which will bind the property if the father leaves any property to his son. When this is clearly understood, it follows that until the property comes into existence the contract remains only a contract by which the party entering into it will be bound, and when the property comes into existence it is a contract for the breach of which he will incur liability. That being so, when the party who contracts becomes bankrupt the liability in respect of that contract is a liability provable in the

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bankruptcy, but by the 49th section he is released, with certain exceptions, from every liability provable, and so, upon obtaining his discharge, the bankrupt will say, "I am discharged from the liability; it was only a liability to which I was subject at the time of bankruptcy, and from that the discharge I have obtained releases me."

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Without saying that that would apply to the case of a marriage settlement containing a covenant to settle after-acquired property, when you have a debt, and a covenant to secure that debt in a particular way, it would be a strange result if you could bar the debt and not what I may call the ancillary covenant. Suppose a man were to covenant that all his after-acquired property should be liable to a charge, the result might be that he never could get free or obtain a fresh start in life. Then what is the effect of the *Bankruptcy Act*? The 12th section says, "Where a debtor shall be adjudicated a bankrupt no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt, except in manner directed by this Act" (this is clearly a remedy in respect of a debt). "But this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not been passed." That proviso manifestly applies only to property which can be realized by the creditor.

Then we come to the 31st section, which makes all liabilities debts provable in bankruptcy. [His Lordship read the section.] That section relieves him so far because the discharge releases him under sect. 49, with certain exceptions, from all debts provable under the bankruptcy. Without saying that this applies to a definite contract for the settlement of a specific property non-existing at the time—for I wish to guard myself against being supposed to be now deciding that point—I am of opinion that where there is a general liability in respect of a debt which is barred by a discharge in bankruptcy, and a liability in respect of a covenant to secure that debt, the bankrupt then is not only discharged from the principal liability to pay the debt, but also

from the ancillary liability to give security for it on his after-acquired chattels, and thus the future property of the bankrupt is absolutely discharged, and therefore the after-acquired chattels are not subject to seizure by the creditor.

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BAGGALLAY, L.J.:—

Under the 12th section of the *Bankruptcy Act* the creditor is barred from any remedy against the property and person of the bankrupt in respect of any debt provable in the bankruptcy, except in manner directed by the Act; and the section contains the following proviso on which Mr. *Byrne* relied [reads the proviso]. The security there spoken of evidently means any security which during the time between the debtor's committing the act of bankruptcy and obtaining his discharge the creditor may hold upon the property.

At the time when the bankrupt committed the act of bankruptcy, and when he obtained his discharge, the only security the creditor held was upon the goods and chattels which were then on the premises. As far as regards the after-acquired chattels, whether the security was in form, as in *Cole v. Kernot* (1), an actual assignment, or, as in *Thompson v. Cohen* (2), merely a covenant or undertaking to assign, the security was only in the nature of a liability; and the 31st section has directly enacted that all liabilities are debts provable in the bankruptcy. When you have established a debt provable in bankruptcy, we come to the 49th section, which says that, with certain exceptions, not applicable to the present case, an order of discharge shall release a bankrupt from all debts provable under the bankruptcy. Consequently any liability on the part of the bankrupt in respect of an obligation to bring after-acquired chattels into an existing security, was a liability which, as being a debt provable, is got rid of by the order of discharge.

The decision in *Thompson v. Cohen* is consistent not only with law but with common sense, and the case of *Cole v. Kernot* applies exactly the same rule to the case of what is in form an actual assignment, as *Thompson v. Cohen* did to that which is merely an undertaking or covenant.

(1) Law Rep. 7 Q. B. 534, n.

(2) Law Rep. 7 Q. B. 527.

C. A. LUSH, L.J.:—

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I am of opinion that, without any reference to the decisions cited before the Vice-Chancellor (which I agree with Lord Justice *Baggallay* in considering to have been rightly decided), the present case is to be decided plainly by the provisions of the *Bankruptcy Act*, 1869, which does not appear to have been brought before the Vice-Chancellor.

The Plaintiff executed a deed which was in form an assignment, but which in fact amounted to a contract that he would appropriate any chattels which he might bring upon the premises to an already existing security. That contract appears to me to be provided for by the 31st section of the Act. The words are as wide as language can possibly make them. No terms can be wider than those in which is given the definition of liability. This was certainly an engagement under which the Plaintiff became liable in money's worth. That liability is declared by the same section to be a provable debt. Then the 49th section says that, with certain exceptions, an order of discharge shall release the bankrupt from all such provable debts; it therefore releases him from the liability which was incurred in respect of that mortgage covenant, and he becomes a free man.

Appeal allowed with costs.

Solicitors: *Grueber*; *H. Levy*.

M. W.



## WALKER v. MOTTRAM.

[1881 W. 2931.]

*Goodwill—Sale of—Rights of Purchaser of—From Vendor personally—From Trustees in Bankruptcy—Solicitation of old Customers.*

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Dec. 5, 21.

The rule of *Labouchere v. Dawson* (1), by which, in the case of a voluntary sale the vendor of the goodwill of a business is precluded from afterwards soliciting the former customers of that business, cannot be extended to the case of a compulsory alienation. The obligation enforced by the rule is purely personal, and not a mere incident to the transfer of property. Therefore the purchaser of the goodwill of a business from a trustee in bankruptcy or liquidation has no right to restrain the bankrupt or liquidating debtor from setting up *bonâ fide* a fresh business and soliciting the customers of his former business, and it is immaterial whether the bankrupt has or has not joined in the conveyance of the goodwill to the purchaser.

Per *Lindley* and *Lush*, L.JJ.: The case of *Labouchere v. Dawson* is still applicable to the case of voluntary sales.

The decision of that case questioned by *Baggallay*, L.J.

*Cruttwell v. Lye* (2) followed.

FOR some time prior and down to the 26th of January, 1880, the Defendant was the owner of the *Sun Brewery, Salford*, and carried on business there as brewer.

On the 26th of January, 1880, he filed a petition for liquidation, and resolutions were duly passed and registered for liquidation of his affairs by arrangement. *William Butcher* and *Charles Marshall* were appointed trustees of his estate, and carried on the Defendant's business at the *Sun Brewery*, and employed the Defendant as manager at a salary.

On the 12th of November, 1880, the Plaintiff and Defendant entered into an agreement with the trustees for the purchase from them of—

1. The premises known as the *Sun Brewery*, partly freehold and partly leasehold, and the fixed and loose plant, rolling stock, horses, drays, carts, and other articles, and the goodwill of the business, and the book and other debts, and the stock-in-trade and other articles and effects. The purchase-money was to be £10,350, to be paid, less £500 deposit paid on the signing of the

(1) Law Rep. 13 Eq. 322.

(2) 17 Ves. 335.

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agreement, on the 1st of December, 1880, when the purchase was to be completed, and the purchasers entitled to the possession or receipt of rents and profits as from the 4th of September last, it being the intention that the purchasers shall have the benefit of the trading of the vendors since the 4th of September, and to bear all loss (if any) incurred thereby.

The Defendant being unable to raise his share of the deposit, the Plaintiff paid the whole amount; and as he was further unable to raise his share of the balance of the purchase-money, an agreement of the 10th of February, 1881, was come to between him and the Plaintiff. The agreement was contained in a letter written by the Defendant to the Plaintiff of that date:—

“Mr. *Henry Walker*,—As I find I am unable to provide the necessary funds for completing our agreement with the trustees of my estate, I authorize and request you to complete it on your account and apart from me, and I surrender to you any interest I might have under this agreement. I hereby request the trustees to convey and assure all the property comprised in that agreement to you alone, on your paying the balance of the purchase-money. . . . I give up to you all interest in the profits of the brewery since the 4th of September last.

“*C. Mottram.*”

The Plaintiff thereupon paid the trustees the balance of the purchase-money, and completed the purchase in his own name on the 12th of April, and the brewery and property were assured by the trustees to him.

The Defendant (who had obtained his discharge on the 24th of November, 1880) took a brewery called the *Swan Brewery*, distant between one and two miles from the *Sun Brewery*, and on the 3rd of June, 1881, he sent to each of the old customers of the *Sun Brewery* the following circular:—

“*Swan Brewery, Pryme Street, Chester Road.*

“Dear Sir,—I beg to inform you that I have purchased the goodwill of the brewery hitherto carried on by Mrs. *E. A. Renshaw* at the above address.

“It is my intention to supply my customers with ales and porters of the finest quality, and I trust, by strict attention to

their requirements, to merit and receive a continuance of their support.

“*Ch. Mottram.*”

There was evidence that the Defendant had by means of these circulars obtained orders to a large amount from some of the old customers of the *Sun Brewery*.

The Plaintiff prayed for an injunction to restrain the Defendant either by himself or his agents from soliciting the custom of customers of the business of a brewer formerly carried on by him at the *Sun Brewery*, and from issuing circulars to such customers advertising to them the fact that he had purchased a brewery and was carrying on business as a brewer to the injury of the Plaintiff as the purchaser and proprietor of the *Sun Brewery*; damages and costs.

The Defendant by his statement of defence alleged that, in reply to an application by the solicitors of the trustees in his liquidation to enter into a covenant or undertaking not to compete for the old customers of the *Sun Brewery*, he had declined to enter into any such covenant or undertaking, it being his intention to start in business again as a brewer on his own account, and that he was entitled to deal with and compete for the old customers. He further alleged that the Plaintiff was aware of the solicitors' application and his reply, and that in the assurance to the Plaintiff the vendors (the trustees) never purported to assure the goodwill to the Plaintiff.

The Defendant further submitted that even if the vendors did purport to sell and convey the goodwill to the Plaintiff, the Plaintiff was not entitled, having regard to the Defendant's liquidation, to the relief claimed.

The Plaintiff moved for an injunction before the Master of the Rolls.

*Chitty*, Q.C., and *E. Cooper Willis*, for the Plaintiff, cited *Labouchere v. Dawson* (1); *Ginesi v. Cooper* (2); *Leggott v. Barrett* (3); *Hudson v. Osborne* (4).

*Ince*, Q.C., and *S. Hall*, for the Defendant, were not called on.

(1) Law Rep. 13 Eq. 322.

(2) 14 Ch. D. 596.

(3) 15 Ch. D. 306.

(4) 39 L. J. (Ch.) 79.

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C. A.      JESSEL, M.R., in the course of the argument said that the case of a bankrupt or a liquidating debtor was different from that of an ordinary vendor of the goodwill of a business, and most of the cases cited were distinguishable on that ground. In *Hudson v. Osborne* (1) the Defendant had held himself out as carrying on his former business. It had never been understood that the doctrine laid down in *Labouchere v. Dawson* (2) applied to the case of a bankrupt whose business had been sold by his trustees.

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The motion was accordingly refused.

C. A.      The Plaintiff appealed from this decision. The appeal came on to be heard on the 15th of November, 1881.

*Higgins, Q.C., and E. Cooper Willis, for the Appellant:—*

The Plaintiff has bought from the trustees, who had statutory power to sell and who agreed to sell, the business as a going concern, expressly including the goodwill.

It is clear that had the Defendant been an ordinary vendor the Plaintiff could restrain him from soliciting the customers of the old firm: *Labouchere v. Dawson*.

That case has been followed by the Master of the Rolls in *Ginesi v. Cooper* (3), and its principle extended by the same Judge in *Leggott v. Barrett* (4); and although in the latter case the extension of the principle was disapproved by the Court of Appeal, the ruling that the vendor of the goodwill of a business cannot solicit the old customers was not affected by the appeal. Then can there be any distinction where the sale is made by a bankrupt's trustees?

The case of *Cruttwell v. Lye* (5) may be cited as supporting the distinction. But that decision may be correct without being against the Plaintiff. The Bankruptcy Laws then in force did not mention goodwill as part of the bankrupt's property. Goodwill is first specifically mentioned in the Act of 1861, and in the present Act (sect. 25, sub-s. 6) is expressly mentioned as included in the property of the bankrupt, which the trustees may sell.

(1) 39 L. J. (Ch.) 79.

(2) Law Rep. 13 Eq. 322.

(3) 14 Ch. D. 596.

(4) 15 Ch. D. 306.

(5) 17 Ves. 335.



The Legislature must be taken to have used the word as having acquired a well-known meaning from decisions and text-books. Then, in the Act of 6 Geo. 4, provision was first made to compel the bankrupt to join in assuring his property: *Griffith and Holmes' Bankruptcy* (1). That provision was continued in the Act of 1869, and there is a distinct obligation on the bankrupt to join in the assurance.

By the present Act everything is vested in the trustees, so that the creditors may have their debtor's whole assets. Whatever a man can sell his trustee in bankruptcy can sell, and the trustee has even larger powers of disposition than the bankrupt himself: *Seear v. Lawson* (2). A bankrupt cannot derogate from the grant of the trustees in respect of goodwill any more than in respect of other property. Whatever a bankrupt can do for his own benefit, his trustee can do for the benefit of the estate. A bankrupt is bound to assist his trustee in the realization of his property for the benefit of his creditors: *Bankruptcy Act*, 1869, s. 19; *Hudson v. Osborne* (3). If the trustees had, instead of selling the brewery, carried it on for the estate for a limited time, could the bankrupt, having regard to sect. 19, even after his discharge, during that period compete with his own trustees by soliciting the customers of the business carried on by his trustees? If the trustees would have the right to prevent it, cannot they transmit that right?

But the difficulty as to the sale being by the trustees is got over here by the second agreement of February, 1881, whereby the Defendant, having by the original agreement of November, 1880, half the goodwill, sells and surrenders all his interest under that agreement, and thus the case is brought within *Genesi v. Cooper* (4).  
 4 The injunction asked for will not prevent the bankrupt from starting afresh in life; he is at liberty to solicit the public generally by advertisement or circulars, and may deal with the customers of the old business, but only may not solicit them.

*Ince, Q.C., and S. Hall, for the Defendant:—*

The evidence shews that the Defendant distinctly refused to

(1) Page 511.

(2) 15 Ch. D. 426.

(3) 39 L. J. (Ch.) 79.

(4) 14 Ch. D. 596.

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give any undertaking not to compete with the Plaintiff, and that the Plaintiff completed his contract with notice of that refusal.

Goodwill is composed of two elements, one positive, that is, property passable by assignment; the other negative, that is, a covenant express or implied not to do things in derogation of the grant.

The argument on the part of the Plaintiff is that the *Bankruptcy Act* vests in the trustee not only the positive benefit the property—but the negative benefit the right to control the future action of the bankrupt by the implied or express covenant. But the trustee cannot bind the bankrupt by a covenant. In *Labouchere v. Dawson* (1), in *Leggott v. Barrett* (2), and in *Genesi v. Cooper* (3), the foundation of the decision is a contract express or implied on the part of the assignor that he will not solicit. The whole question therefore comes to this, Is *Cruttwell v. Lye* (4) still law, or is there any change in the bankruptcy laws? We say that that case is still good law; it is recognised by the Master of the Rolls in *Genesi v. Cooper*, referring to which he says: “The assignees can only sell property, but the trader himself can sell not only the property but a negative right as against himself.”

In that case the goodwill was mentioned in the particulars of sale, and an affidavit stated that the bankrupt was soliciting the old customers.

The goodwill mentioned in the *Bankruptcy Act* means only the probability that the old customers will resort to the old place of business: *Cruttwell v. Lye* (5), and see definitions in *Chissum v. Dewes* (6); *Ex parte Punnett* (7); *Churton v. Douglas* (8). The case of *Johnson v. Helleley* (9) gives the form adopted in the case of the sale by the Court of goodwill, and shews what passes under goodwill.

The case of *Labouchere v. Dawson* does decide that the assignor of goodwill cannot solicit, but it does not shew that no one else can. There is no reason to extend the doctrine of that case. The case, however, is not binding upon this Court.

(1) Law Rep. 13 Eq. 322.

(2) 15 Ch. D. 306.

(3) 14 Ch. D. 596.

(4) 17 Ves. 335.

(5) 17 Ves. 346.

(6) 5 Russ. 29.

(7) 16 Ch. D. 226.

(8) Joh. 174.

(9) 2 D. J. &amp; S. 446.

*Spence*

The word "goodwill" is only mentioned in the Act in the clause which deal with the assignment of the bankrupt's property, but not in those dealing with the property vested in them by the bankruptcy. There is nothing in the Act which shews that this negative benefit to which the Master of the Rolls refers passes to the trustee. There is a vital distinction between the case of a sale by an ordinary vendor and a sale by a trustee in bankruptcy. In the former case the vendor gets the money, but if a man is bankrupt all his assets are taken away, and his only chance of obtaining anything by the sale is if there be a surplus.

As to the agreement of February, 1881, the Plaintiff obtains nothing more by that than he had under the former agreement; it amounts merely to a withdrawal by the Defendant from the benefit of the earlier agreement.

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*Higgins*, in reply :—

The question is whether the line drawn by *Labouchere v. Dawson* (1) is reasonable. We contend that it is, because it does not prevent the vendor trading, but only forbids him to go to the old customers to destroy that for which he has obtained the money. If that is not so, what is the benefit of goodwill? All property involves positive and negative rights. Then the reason for the distinction in the case of bankruptcy cannot be sustained. The sum obtained by the realization of his property will be greater if the Plaintiff's contention is right, and the bankrupt will, besides being nearer his discharge, be entitled to the surplus. Therefore anything that tends to benefit the realization of his assets indirectly benefits the bankrupt personally.

1881. Dec. 21. BAGGALLAY, L.J., delivered the judgment of Lords Justices *Lush* and *Lindley* as follows :—

The facts of this case are not in dispute, and may be stated shortly as follows :—The Defendant, who was a brewer, petitioned for the arrangement of his affairs by liquidation; trustees were appointed, and they agreed to sell the brewery and the goodwill of the business to the Plaintiff and the Defendant. The Defendant afterwards, being unable to find his share of the purchase-

(1) Law Rep. 13 Eq. 322.

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money, gave up all his interest in the purchase to the Plaintiff; the Plaintiff paid the whole purchase money for the brewery and business to the trustees and took a conveyance of the brewery premises from them, but no actual conveyance or assignment of the goodwill has yet been made to the Plaintiff. The Plaintiff, however, has taken possession of the property purchased, and has carried on the business, as he was clearly entitled to do under the agreements and conveyance above alluded to. The Defendant has himself commenced another brewery business, and has sent circulars to some of the old customers of the business bought by the Plaintiff, and has solicited their custom; and the Plaintiff seeks in this action to recover damages for the injury thus caused him, and to restrain the Defendant by injunction from continuing to solicit the old customers for orders. A motion for an injunction was made before and refused by the Master of the Rolls, and the Plaintiff has appealed from his decision. The Plaintiff contends that, having bought the old business of the Defendant, with its goodwill, he is entitled to restrain the Defendant from doing what is complained of, and the Plaintiff relies on *Labouchere v. Dawson* (1) as an authority in his favour. If the Defendant had himself sold his business and goodwill to the Plaintiff, that decision would be directly applicable. But the Defendant contends that the decision, even if right, does not apply, and ought not to be extended to a case in which the business and goodwill have been sold by the Defendant's trustee in bankruptcy, and not by the Defendant himself. The question thus raised is of very considerable importance, and by no means free from difficulty. The case of *Labouchere v. Dawson* was decided in 1872; it was followed and extended in *Ginesi v. Cooper* (2); and although the extension has been overruled (see *Leggott v. Barrett* (3)), the decision itself was approved by one at least of the members of the Court which disapproved and overruled its extension. The rule laid down in *Labouchere v. Dawson* has, it is believed, been recognised and acted upon in practice, and, whatever else may be said of it, the rule is in accordance with general opinion as to what is fair and right, and is easily applied in practice. At the same time it is,

(1) Law Rep. 13 Eq. 322.

(2) 14 Ch. D. 596.

(3) 15 Ch. D. 306.



we think, impossible to read the cases relating to goodwill decided before 1872 without coming to the conclusion that the decision in *Labouchere v. Dawson* (1) went considerably beyond them. The judgment of Lord Eldon in *Cruttwell v. Lye* (2), his elaborate and carefully worded order in *Cook v. Collingridge* (3), the judgment of Vice-Chancellor Wood in *Churton v. Douglas* (4), and that of the Court of Appeal in *Johnson v. Helleley* (5), do not warrant the extension; and *Cruttwell v. Lye* is a clear authority that, if the assignees of a bankrupt sell his business and goodwill, the purchaser cannot restrain the bankrupt either from commencing a similar business himself or from soliciting his old customers to deal with him in his new business. The right of the assignees in that case to sell the goodwill was not questioned, and so far as it was property they apparently had the right to sell it, although the Bankruptcy Acts then in force did not expressly mention it. The Bankruptcy Acts of 1861 and 1869 did expressly authorize the sale of goodwill, and whatever will pass by a mere sale thereof, apart from any covenant or agreement or representation or fraud on the part of the bankrupt, can be assigned by his trustee in bankruptcy. The bankrupt himself can probably be compelled under sect. 19 of the *Bankruptcy Act*, 1869, to join in the conveyance or assignment of his business and goodwill for the benefit of his creditors, but he cannot be compelled to enter into any covenant restricting him from carrying on business in future in any way whatever. (See *Robson's Bankruptcy* (6).) An assignment of a business and its goodwill, without more, appears to us to pass now just as much and no more than in the days of Lord Eldon. As against the assignor it confers on the assignee the exclusive right to carry on the business assigned, and, as incidental to this, it also confers on him the exclusive right to represent himself as carrying on that business, and consequently the right, not only to sue the assignor for damages if he has infringed these rights, but also to restrain him from infringing them if he manifests an intention to infringe them. Moreover, to this extent a

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(1) Law Rep. 13 Eq. 322.

(2) 17 Ves. 335.

(3) Collyer on Partnership, p. 215.

(4) Joh. 174.

(5) 2 D. J. & S. 446.

(6) 3rd Ed. p. 579.

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bankrupt who does not concur in his trustee's assignment is in no better position than a bankrupt who does. Every bankrupt, whether he concurs or not, is bound by every lawful disposition of his property by his trustee (see *Hudson v. Osborne* (1)), and whatever rights such a disposition confers on a purchaser must be respected by the bankrupt, whether he joins in the conveyance or not. But in our opinion, the right of a purchaser of the goodwill of a business from the trustee in bankruptcy does not extend to restrain the bankrupt (even if he joins in the conveyance) from *bonâ fide* commencing a fresh business, and from seeking assistance in it from his old friends and customers. It would, in our opinion, be contrary to the policy of the Bankruptcy Laws to extend *Labouchere v. Dawson* (2) to such a case. It is not necessary to overrule that decision; we leave it where it is, that is to say, it will still be applicable to voluntary sales. But we do not think it ought to be extended to alienations which are compulsory. When a man sells his own business and goodwill for his own benefit it is thought unfair on his part to avail himself of his personal acquaintance with his old customers and to induce them to withdraw their support from the business he has sold, and this element of personal unfairness may be sufficient to justify the decision in *Labouchere v. Dawson*. The case is put on the ground of implied contract by Lord Justice Brett in *Leggott v. Barrett* (3), and this is perhaps the best ground on which to rest the decision. The obligation enforced in *Labouchere v. Dawson* is, however, a purely personal obligation, and not a mere incident to the transfer of property. If the case now before us had arisen after the passing of the present *Bankruptcy Act*, or the Act of 1861, but before the decision of *Labouchere v. Dawson*, the case would, we think, have been decided against the Plaintiff, and, notwithstanding *Labouchere v. Dawson*, we think the case ought so to be decided now.

With respect to the effect of the agreement of the 10th of February, 1881, on which the Plaintiff's counsel relied in order to bring this case directly within *Labouchere v. Dawson*, it appears to us that the agreement does not place the Plaintiff in any better

(1) 39 L. J. (Ch.) 79.

(2) Law Rep. 13 Eq. 322.

(3) 15 Ch. D. 306.

position than if the goodwill had been assigned to him by the trustee and the Defendant as a concurring party. That agreement does not amount to a fresh sale by the Defendant of his interest in the business and goodwill; it simply amounts to a withdrawal by him from the previous arrangement and to an authority to the trustees to deal with the Plaintiff alone. The case turns really on what the trustees in the liquidation could convey and assign to the Plaintiff, and for the reasons we have given we are of opinion that, as the Defendant has done nothing personally unfair on his part and has carefully avoided all appearance of carrying on the business sold by his trustees, he cannot be restrained from soliciting his old friends and business connections to assist him in carrying on the new business which he unquestionably has a right to commence. The appeal must, therefore, be dismissed with costs.

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BAGGALLAY, L.J.:—

As I have said, the judgment I have read is the joint judgment of Lords Justices *Lush* and *Lindley*. I substantially agree with what is stated in it, but I desire to add a few observations with reference to the case of *Labouchere v. Dawson* (1). *Labouchere v. Dawson* was acted upon and extended by the Master of the Rolls in *Ginesi v. Cooper* (2), in which case he restrained the party who sold the business from soliciting customers. He took the same view in a subsequent case of *Leggott v. Barrett* (3), which came by appeal to this Court; on the appeal, the defendant did not object to so much of the injunction as came within the strict meaning of *Labouchere v. Dawson*; but he objected to the extension of it which had been made by the Master of the Rolls, following his own decision in *Ginesi v. Cooper*, and that decision was dissented from by the Court of Appeal; practically, therefore, in *Leggott v. Barrett*, the injunction, to the extent of what had been done in *Labouchere v. Dawson*, remained, though the extension was rejected. Now, I am not aware that the case of *Labouchere v. Dawson* has been referred to in any other case in this Court, except

(1) Law Rep. 13 Eq. 322.

(2) 14 Ch. D. 596.

(3) 15 Ch. D. 306.

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in the case of *Hookham v. Pottage* (1). It was referred to in the argument of that case, but was not in any way commented upon or noticed in the course of the judgment. Therefore, at the present time, as it appears to me, there is no authoritative adoption of the decision of *Labouchere v. Dawson* (2) by the Court of Appeal. In the case of *Leggott v. Barrett* (3), in which the extension of the doctrine was rejected by this Court, Lord Justice *James* made this observation (4): "I do not like going much into the case, because what I should say might perhaps be considered to mean that the injunction which is submitted to is too wide." This is an intimation of a doubt on the part of the learned Judge who used that observation. He did not consider the decision in *Labouchere v. Dawson* as altogether free from doubt. Lord Justice *Brett*, on the other hand, expressed his entire concurrence, if it were necessary to express his concurrence, with what had been decided in *Labouchere v. Dawson*; but Lord Justice *Cotton*, as I read his judgment, also abstains from expressing any opinion upon the point. What he said was this (5): "It was well known what a sale of goodwill implied, and subject to the question whether it does justify the previous part of the injunction in this case," &c. I think, therefore, that there was at least an expression of opinion on the part of two of the learned Judges who decided *Leggott v. Barrett* that it was not to be assumed that they concurred in the decision of *Labouchere v. Dawson*. I should not have ventured to make the remark which I am now about to make had I not felt that *Labouchere v. Dawson* had not received the assent of the Court of Appeal, but I am bound to say that I much doubt the correctness of the decision of *Labouchere v. Dawson*. It appears to me, as at present advised, that it went far beyond what any of the previous decisions would have sanctioned. I say no more than this, that, should that decision ever be questioned or brought forward in a case in which it would be essential to determine the point, I should desire to have an opportunity of fully considering whether I should concur in it or not. For the decision of the present case, it is not necessary to say whether *Labouchere v. Dawson* was

(1) Law Rep. 8 Ch. 91.

(3) 15 Ch. D. 306.

(2) Law Rep. 13 Eq. 322.

(4) Ibid. 309.

(5) 15 Ch. D. 315.



rightly decided or not. With what has been said by my two learned colleagues, assuming it to have been rightly decided, I entirely agree.

The appeal will be dismissed with costs.

Solicitors for Plaintiff: *Last & Sons*, agents for *Brett & Craven*, *Manchester*.

Solicitors for Defendant: *W. F. Watson*, agent for *Newton, Jones, & Campion*, *East Retford*.

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*Liquidation Proceedings—Transfer to another Court—Meetings of Joint and Separate Creditors—Bankruptcy Rules, 1870, rr. 285, 288.*

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The proceedings under a liquidation petition filed by partners cannot be transferred from the Court in which they were commenced to another Court, unless a resolution directing the transfer is passed, not only by a general meeting of the joint creditors, but also by separate general meetings of the separate creditors of each partner.

Rule 285 applies to all cases in which meetings of creditors have to be held under a liquidation petition by partners, and in all such cases separate meetings must be held of the joint creditors, and of the separate creditors of each partner.

ON the 13th of August, 1880, *Frederick Wood* and *John Robinson*, who carried on the business of drapers in partnership at *Newcastle-under-Lyme*, filed a liquidation petition in the *Hanley* County Court. On the 7th of September, 1880, the first meeting of their creditors under the petition was held, when it was resolved that the affairs of the debtors should be liquidated by arrangement, and a trustee and a committee of inspection were appointed. On the 8th of September a meeting of the separate creditors of *Wood* was held and also a meeting of the separate creditors of *Robinson*, at both of which similar resolutions were passed, the same trustee being appointed. On the 11th of April, 1881, a meeting of the joint creditors was held, and a special resolution was passed that the proceedings under the petition should be transferred to the *Manchester* County Court. No meetings of the

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separate creditors were summoned or held to consider the question of the transfer. The filing of the resolution was opposed by one of the joint creditors, who was also a separate creditor, and the Registrar refused to file the resolution or to allow the transfer, on the ground that no resolution to transfer had been passed by the separate creditors, and that it was necessary that separate resolutions for that purpose should be passed at distinct meetings of the separate creditors. This decision was affirmed by the Judge of the County Court. The trustee appealed to the Chief Judge. The appeal was heard on the 28th of November, 1881.

*Smyly*, for the Appellant, contended, upon the Bankruptcy Rules, 1870, r. 285, that the separate creditors were bound, except as to the distribution of assets, by the resolutions passed by the joint creditors, and as such had no voice in any of the proceedings under the joint adjudication; their only right being to appoint a committee of inspection from their own body and to come to such resolution as they may think fit as to the liquidation of the separate estate of their individual debtor. The term "the creditors" used in rule 288 must mean the joint creditors generally.

*E. Cooper Willis*, for the dissentient creditor.

BACON, C.J., held that the appeal could not be sustained. The wording of rule 288 was clear, and when it said that there must be a resolution by "the creditors assembled at any general meeting," that must mean all the creditors, separate as well as joint. In this case a resolution of the joint creditors only had been obtained. The distinction between joint and separate creditors was distinctly recognised, and the rights of each class were carefully preserved. No reason whatever had been assigned for transferring the proceedings, and such a transfer would be a wasteful, useless, and improvident act, not in any way justified by the circumstances of the case. The appeal must be dismissed with costs.

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From this decision the trustee appealed. The appeal was heard on the 12th of January, 1882.

*Smyly*, for the Appellant:—

As a matter of fact, in the present case all the separate creditors who have proved are also joint creditors, and they had notice of the meeting. Under rule 304 only those creditors who have proved are entitled to receive notice of a general meeting subsequent to the appointment of a trustee. A majority of the creditors who have proved was in favour of the transfer.

It is not necessary that for the purpose of approving of a transfer of the proceedings under rule 288 there should be separate meetings of the joint and separate creditors. Rule 285 (1) applies only to the first meeting under a liquidation petition, when the creditors have to decide in which way the estate is to be liquidated, whether they will have a bankruptcy, a liquidation by arrangement, or a composition.

[JESSEL, M.R.:—Suppose the separate creditors had a large majority in value?]

That is a thing which would not often happen, and it may be that such a case is not provided for by the rules. But then the

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(1) Rule 285 provides that “in cases of proceedings for liquidation by arrangement or composition, instituted by partners, separate meetings of the different classes of creditors shall be held; thus, if the partnership consists of *A.*, *B.*, and *C.*, a meeting of the joint creditors of *A.*, *B.*, and *C.* shall be first held, and separate meetings of the separate creditors of *A.*, *B.*, and *C.* shall be held at a date or time subsequent to the meeting of the partnership creditors. The joint creditors may come to such resolution as they may think fit with regard to the joint estate. The separate creditors may also come to such resolution as they may think fit as regards the liquidation of the estate of their individual debtor, but, in the event of their determining upon his bankruptcy, or the liquidation of his estate by arrangement, they shall choose the same trustee, if any, as has been or

shall be appointed by the joint or partnership creditors, but they may appoint a committee of inspection from their own body, if they think fit, or they may adopt the committee (if any,) appointed by the joint or partnership creditors.”

Rule 288: “The creditors assembled at any general meeting may include in their resolution a direction that the proceedings be transferred to any Court other than that in which the same were originated; and, upon any such resolution being filed, the proceedings shall be forthwith transferred by the Registrar in accordance therewith, and the Court to which the same shall have been transferred shall thereafter act in the matter of the proceedings in like manner as if the same had been properly instituted therein in the first instance.”

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separate creditors would have a majority at an aggregate meeting of joint and separate creditors. In bankruptcy the practice has always been that everything, except the discharge of the bankrupt, shall be determined by the vote of the joint creditors. No separate meetings of the separate creditors are held, and they have not a voice even in the appointment of a committee of inspection. But for rule 76 separate creditors could not prove in a joint bankruptcy. The provisions as to the transfer of the proceedings in a bankruptcy are contained in sect. 80 (sub-sect. 5), and rules 82-84. In a bankruptcy the joint creditors have an absolute authority, and the Court will endeavour to make the practice in bankruptcy and liquidation the same, unless the rules clearly provide that there shall be a difference. It is clear from the report of *Ex parte Philips* (1), that in that case a transfer of the proceedings under a joint liquidation petition took place without the sanction of any separate meeting of the separate creditors.

*E. Cooper Willis*, for separate creditors :—

It would be highly inconvenient if the joint creditors could transfer the proceedings without consulting the separate creditors ; the amount of the joint debts might be as nothing compared with that of the separate debts. In many respects the practice in liquidation proceedings differs from that in a bankruptcy. Suppose the separate creditors resolved on a liquidation by arrangement and the joint creditors on a bankruptcy, could the joint creditors direct that the liquidation proceedings should be transferred to another Court ? Would not their power be limited to the bankruptcy proceedings ? Suppose there was only one committee of inspection, then, if the appellant is right, they might be dragged all over *England* to suit the convenience of a trustee who wished to bring the proceedings to the Court of the district in which he resided. In a bankruptcy the Court has a discretion as to allowing a transfer of the proceedings ; in a liquidation the creditors have the sole power. The words of rule 285 are large enough to include all cases where meetings of creditors are to be held under a joint liquidation petition, and the intention is that in all matters affecting all the estates there shall be separate

(1) Law Rep. 19 Eq. 256.



meetings of the joint and separate creditors. In *Ebbs v. Boulnois* (1), the Court fully recognised the distinct rights of joint and separate creditors. Each class of creditors has a right to deal with matters affecting only its own interests, not to deal with the interests of other classes without their consent. The joint creditors cannot transfer the proceedings without the consent of the separate creditors. In *Ex parte Philips* (2) the question of the power to transfer was not before the Court. The rules shew that there is to be a different practice in bankruptcy and in liquidation proceedings, and convenience is in favour of a transfer not being made without a *consensus* of all classes of the creditors.

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*Smyly*, in reply :—

If the joint creditors do not appoint a trustee, the separate creditors cannot appoint any.

JESSEL, M.R. :—

This is an appeal from a decision of the Chief Judge, affirming a decision of the County Court Judge, which affirmed the previous decision of the Registrar as to a small point of practice, which, so far as I understand, has seldom arisen, and as to which there does not appear to have been any direct decision. We have listened to a long and skilful argument on the history of the law and practice in bankruptcy, but, as I intend to confine my judgment to the construction of the rules 285 and 288, that history, curious as it is, need not be considered. It is clear that the rules which are applicable to bankruptcy do not in all cases apply to liquidation by arrangement; consequently, all the arguments which are founded upon what would take place in a bankruptcy fail. It is not easy to construe the rules, but this may not be the fault of the draftsman, for cases will arise which are not foreseen, and which are, therefore, not provided for. This arises, not from any want of the power of expression or want of knowledge on the part of the draftsman, but from a want of the power of prevision.

In the present case the joint creditors wish to transfer the proceedings from the *Hanley* Court to the *Manchester* Court.

(1) Law Rep. 10 Ch. 479.

(2) Law Rep. 19 Eq. 256.

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Jessel, M.R.

Some of the separate creditors do not agree to this. No separate meeting of the separate creditors has been held to consider the matter. The question is whether the transfer can be made without the consent of the separate creditors given by a resolution passed at a separate meeting. [His Lordship read rules 285 and 288.]

Rule 285 appears to be worded generally. It says in the first sentence that "in cases of proceedings for liquidation by arrangement or composition, instituted by partners, separate meetings of the different classes of creditors shall be held."

I cannot find anything in the latter part of the rule to cut down the meaning of the first sentence, which is quite general in its terms; and if this be so, the meaning of the rule is that, in all cases where meetings of creditors are to be held under a liquidation petition filed by partners, separate meetings of the joint and separate creditors shall be held.

If this is the meaning of rule 285, does it create any difficulty in the construction of rule 288? There is, no doubt, this difficulty, that, if rule 288 be read literally, the result might be that, for instance, in a case where a petition is filed by two partners, and consequently three meetings of creditors must be held—a meeting of the joint creditors, and meetings of the separate creditors of each partner—resolutions might be passed to transfer the proceedings as to the three estates to three different Courts. But I think the true meaning of the rule is, that the whole of the proceedings shall be transferred to one and the same Court, and there cannot be a transfer at all unless all the three meetings decide upon a transfer to the same Court. They must all concur in the transfer, for, if they do not, there cannot be a transfer of the whole of the proceedings. I think that this construction fairly carries out the intention of the rule. You cannot tell *à priori* whether the debts due to the joint or the separate creditors are the larger in amount, and therefore it is a fair thing to say that all three meetings shall concur in the transfer. As to the argument which has been founded on the practice in bankruptcy, that practice sprang up under a very different system, and it is manifest that it is not intended to govern the proceedings under a liquidation petition.

BRETT, L.J.:—

I am of the same opinion, and for the same reasons, founding my judgment entirely on the construction of rules 285 and 288.

LINDLEY, L.J.:—

I am of the same opinion. Rule 288, following, as it does, rule 287, is, no doubt, worded so as to be strictly applicable only to the case of a sole debtor, but I think we must read it as applying also to a petition by joint debtors, and the only way which I can see to make it workable is by putting on it the construction which has been adopted by the Master of the Rolls, and which involves no undue straining of the words. It must mean that the transfer is to be approved by meetings of both joint and separate creditors.

Solicitors for Appellant: *Phelps, Sidgwick, & Biddle*, agents for *Sale, Seddon, & Co., Manchester*.

Solicitors for Respondent: *Pitman & Son*, agents for *Joseph Griffith, Newcastle-under-Lyme*.

W. L. C.

## SANDERS v. SANDERS.

[1879 S. 560.]

*Statute of Limitations* (3 & 4 Will. 4, c. 27), s. 34—*Acknowledgment—Expiration of Twenty Years.*

*T.* and *J.* became entitled in possession to a freehold as tenants in common in 1833. In 1879, persons claiming under *J.* brought an action for sale or partition. The Defendant, who claimed under *T.*, alleged that *T.* was in receipt of the rents of the entirety from 1833 to 1864, without accounting, and claimed the benefit of the *Statute of Limitations*. The parties entered into admissions, which stated that *T.* received the rents of the entirety from 1833 till his death in 1877, and that *T.* paid to the solicitors of *J.*'s mortgagees a moiety of the rents due in November, 1864, and continued to pay to them a moiety of the rents till his death. The admissions did not state, nor was there any evidence, whether *T.* did or did not account for a moiety of the rents before 1864:—

*Held*, by *Malins*, V.C., that the acknowledgment by *T.* of *J.*'s title, though

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*Ex parte*  
HORROCKS.

*In re*  
WOOD.

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after twenty years' adverse possession, excluded the operation of the *Statute of Limitations*, and that the Plaintiffs were entitled to judgment.

*Held*, by the Court of Appeal, that where a tenant in common has gained by the statute an adverse title to another share of the property, no payment of rent or acknowledgment by him can restore the title which has been extinguished by the statute:

But, *held*, that the payment of a moiety of the rents to persons claiming under *J.* from 1864 to 1877, raised a presumption that a similar payment was made previously, and that as the admissions did not negative this inference, the defence on the *Statute of Limitations* could not be supported:

*Held*, also, that the Defendant ought not to be allowed to bring forward fresh evidence on the appeal to shew that *T.* had not accounted for a moiety of the rents prior to 1864.

*THOMAS SANDERS*, by will proved in 1814, devised a small real estate to his wife, *Ann Sanders*, for life, with remainder to his sons *Thomas Sanders* and *John Sanders*, as tenants in common in fee. The wife died in 1833. In 1863 *John Sanders* charged his moiety with a debt of £200 due to *Thomas Bolton*, and on the 3rd of June, 1864, mortgaged it to *Elizabeth Weatherill*, subject to *Bolton's* charge. *Thomas Sanders* the son died in July, 1877, intestate, leaving the Defendant *Thomas Sanders* the grandson his heir-at-law. From 1864 till November, 1877, *Thomas Sanders* the son and *Thomas Sanders* the grandson successively paid one moiety of the rent of the property to the solicitors of the mortgagees, but in November, 1877, the Defendant *Thomas Sanders* refused to continue the payment. *John Sanders* died in 1878, and the Plaintiff *John Sanders* was his sole devisee. In 1879 this action was commenced by *John Sanders* the younger, *Elizabeth Weatherill*, and *Bolton*, against the grandson, *Thomas Sanders*. The statement of claim contained allegations to the effect of the above statement, and also alleged that soon after the execution of the mortgage of June, 1864, an agreement was entered into between the mortgagees and *Thomas Sanders* the son, that he should receive the whole rents on behalf of himself and them, and that he did, accordingly, from that time till his death, receive the rents and pay over one half to their solicitors. The Plaintiffs prayed for a sale in lieu of a partition of the property, and an account of rents from November, 1877.

The Defendant, by his statement of defence, alleged that, on



the death of *Ann Sanders*, *Thomas Sanders* the son entered into possession of the entirety of the premises, and remained in possession and in receipt of the rents for upwards of twenty years from her death, without interruption and without accounting to *John Sanders*, or any person claiming through him, for any portion of the rents, and the Defendant claimed the benefit of the *Statute of Limitations*.

The Plaintiff amended his statement of claim by alleging that during the whole of the period from the death of *Ann Sanders* till 1864, *Thomas Sanders* the son was in receipt of the rents to the extent of one moiety thereof, as the agent or bailiff and for the benefit of *John Sanders*, and accounted for and paid such moiety to him. The Defendant, by his amended statement of defence, stated that he did not admit these facts.

The following admissions were entered into by the parties:—

1. Upon the death of *Ann Sanders*, *Thomas Sanders* the son, through whom the Defendant claims title, entered into receipt of the rents and profits of the entirety of the hereditaments and premises in the pleadings mentioned, and from and after the decease of the said *Ann Sanders* and down to his death continued in such receipt.

2. The said *Thomas Sanders* the son died on the 29th of July, 1877. The Defendant was his eldest son and his heir-at-law at the time of his decease, and the Defendant, upon his said father's death, entered into the receipt of the rents and profits of the entirety of the hereditaments and premises in the pleadings mentioned.

3. *Thomas Sanders* the son paid to the Plaintiff's solicitors, for their use, a moiety of the rents of the said hereditaments and premises due November, 1864, and continued to pay to the said solicitors a moiety of the said rents till the time of his death, for the use of the Plaintiffs.

4. After the death of *Thomas Sanders* the son the Defendant paid to the Plaintiffs' solicitors, for their use, extra rent received by *Thomas Sanders* the son up to May, 1877, from the tenants of the property at *Guisborough*, and not accounted for by him. The Defendants also paid to the Plaintiffs' solicitors, for the use of the Plaintiffs, an occupation rent in respect of a moiety of the property

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at Kirby, occupied by himself up to November, 1877, and a moiety of a year's rent received by him from *Starling*, a tenant of part of the property to November, 1877, and a moiety of the rent due from *Agar*, another tenant, to May, 1877.

The case came on before Vice-Chancellor *Malins*, on the 21st of February, 1881, and the Plaintiff proposed to adduce evidence that *Thomas Sanders* had accounted for a moiety of the rents before 1864, but the view which the Vice-Chancellor took of the case making this immaterial, the evidence was not taken. The Defendant did not offer any evidence.

*Glasse*, Q.C., and *George Williamson*, for the Plaintiff:—

Possibly, the Defendant might have availed himself of his title by possession, and it might have been held, that by sect. 34 of 3 & 4 Will. 4, c. 27, the right of *John Sanders* was barred, but *Thomas Sanders* the son chose to acknowledge the title of *John Sanders*, and that destroys the effect of that section, even though the acknowledgment was made after the expiration of the twenty years: *Stansfield v. Hobson* (1). The rents have been duly paid over for fourteen years, and it is absurd now to set up this title.

*Higgins*, Q.C., and *Herbert Smith*, for the Defendant:—

No doubt we have not stood on our rights, and have, without reflection, paid these rents; but the 34th section is clear, and at the end of twenty years the right was extinguished and gone, *John Sanders* became a stranger, and the Court cannot now look behind and see what previous rights existed. No mere payment or acknowledgment can restore an estate which is gone.

[MALINS, V.C., referred to *Incorporated Society v. Richards* (2).]

In *Stansfield v. Hobson* the point was not argued before the Court of Appeal. In *Markwick v. Hardingham* (3) the question seemed to have been considered open: *Brassington v. Llewellyn* (4).

MALINS, V.C., after stating the facts of the case, continued:—

So that from 1864 to 1877 the rents have been duly paid;

(1) 16 Beav. 236; 3 D. M. & G. 620.

(2) 1 Con. & L. 58.

(3) 15 Ch. D. 339, 346.

(4) 27 L. J. (Ex.) 297.

and this action being brought in 1879 it is now suggested that between 1833 and 1864 there had been an adverse possession, and that the right of the Plaintiffs had been extinguished. I am clear that when the *Statute of Limitations* has run in favour of one and against another, and the former chooses afterwards to acknowledge the right of the latter, that acknowledgment given after the expiration of the twenty years restores the right to the latter. The point seems to have been expressly decided in *Stansfield v. Hobson* (1) in the case of a mortgagor. The clause as to that in the Act 3 & 4 Will. 4, c. 27, is the 28th. [His Lordship read the clause.] The clause on which the mortgagee in that case, and the Defendant in this case relies, is the 34th. "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action or suit respectively, might have been made or brought within such period shall be extinguished." But the meaning of that is that the right or title shall be extinguished in favour of those who desire it to be so, but not as to others. And a right to make an entry is under the same rules as a right to redeem. [His Lordship read parts of the 2nd and 3rd clauses.] And in the case of a right to redeem it was in *Stansfield v. Hobson* formally decided by the Master of the Rolls (2), and confirmed by the Court of Appeal (3), that an acknowledgment after the end of the twenty years took the case out of the statute. In that case the mortgagee might have declined to answer or acknowledge the right of the mortgagor, but he chose to answer, and his answer was held to be a sufficient acknowledgment, and that was the only question raised. Something was said by Lord Justice *Thesiger* in *Markwick v. Hardingham* (4), but he then expressed no opinion and only asked whether there had been any decision on the subject, and he might have been told that *Stansfield v. Hobson* was such a case. Then Mr. *H. Smith* cited *Brassington v. Llewellyn* (5), but that has no application to this case, as it was clear that there had

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(1) 3 D. M. &amp; G. 620.

(3) 3 D. M. &amp; G. 620.

(2) 16 Beav. 236.

(4) 15 Ch. D. 346.

(5) 27 L. J. (Ex.) 297.

C. A.      been no acknowledgment. It seems to me very absurd to set up  
 1881      the *Statute of Limitations* after a subsequent lapse of fourteen  
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As between these parties there must be the usual decree for a sale and partition; and the Defendant must pay the costs of the action so far as they have been increased by his contesting the right of the Plaintiff.

C. M.

C. A.      The Defendant appealed. The appeal was heard on the 29th of November, 1881.

*Higgins*, Q.C., and *Herbert Smith*, for the Appellant:—

The Vice-Chancellor decided that it was no matter whether *Thomas Sanders* had been in possession for twenty years without accounting or not, for that there was a subsequent acknowledgment of the Plaintiffs' title, which took the case out of the statute, for which he relied on *Stansfield v. Hobson* (1). But it is manifest that in *Stansfield v. Hobson* the Lords Justices overlooked this point, which is not noticed in either of the judgments. In *Markwick v. Hardingham* (2) the point was treated as open; and *Brassington v. Llewellyn* (3) and *In re Alison* (4) shew that after a title has been extinguished by the statute, a subsequent acknowledgment is of no avail.

[*Culley v. Doe dem. Taylerson* (5) was also referred to.]

[JESSEL, M.R.:—The admissions do not appear to me to shew that the statute had run in favour of *Thomas Sanders*.]

We submit that the reasonable inference from the admissions, taken as a whole, is that, prior to 1864, *Thomas Sanders* received the rents without accounting, and the case was argued below on that footing. If that be not the true construction, it is a surprise upon us. We were prepared with evidence to shew that he did not account during that period, and we ask, under Order LVIII., rule 5, to be allowed to adduce it now.

*Glasse*, Q.C., and *George Williamson*, *contrà*, were not called upon.

(1) 3 D. M. & G. 620.

(3) 27 L. J. (Ex.) 279.

(2) 15 Ch. D. 339.

(4) 11 Ch. D. 284.

(5) 11 A. & E. 1008.



JESSEL, M.R.:—

This case is singularly circumstanced. It is an appeal from a decision of Vice-Chancellor *Malins*, who appears to have decided that where a tenant in common has gained an adverse title to another share of the property under the *Statute of Limitations*, a complete title which extinguishes any other, he can by payment of rent or by subsequent acknowledgment restore the title which has been extinguished. There appears to have been some authority in support of that conclusion and some against it, but I must express my dissent from so much of his judgment as affirms that proposition. As I said in *In re Alison* (1), when a title has been extinguished by the statute, no mere acknowledgment by the person who has acquired under the statute as good a title as if a conveyance had been made to him can restore the old title. The contrary was, indeed, decided in *Stansfield v. Hobson* (2), but when we look at that case we find that the point is not noticed in the judgment of either of the Lords Justices, though it appears to have been taken in argument. Considering the importance of the point, I cannot think that either of those learned Judges would have decided it without making any remark on the subject, and I think it must have been overlooked by them. I think, therefore, that *Stansfield v. Hobson* is no authority in support of the proposition that an acknowledgment after the statute has run can take the case out of the statute; and *In re Alison*, which is a decision by the Court of Appeal, shews that it cannot. In justice to the Vice-Chancellor, I must observe that *In re Alison* was not referred to before him. If then there had been nothing more in the case, I think the Appellant would have been entitled to our judgment.

The appeal, however, is from the judgment, not from the reasons given for it, and not unfrequently a judgment can be supported on grounds not taken in the Court below. That, in my opinion, is so here. The case came on upon admissions. The estate of *Thomas Sanders* and *John Sanders* came into possession on the death of the testator's wife in 1833. *Thomas* alone entered into possession, and remained in possession till 1877, when he died. The Defendant then entered into possession, and remained

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(1) 11 Ch. D. 284.

(2) 3 D. M. & G. 620.

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so till the commencement of this action. In 1864, *Thomas Sanders* commenced paying to the solicitors of persons claiming under *John Sanders*, for their use, one moiety of the rents, and continued to do so till his own death, and after his death his son, the Defendant, continued such payment down to November, 1877. Therefore, for a period of thirteen years, ending about two years before the commencement of this action, there was a regular payment of a moiety of the rents to persons claiming a moiety of the estate under *John Sanders*. The Plaintiffs considered that in this state of circumstances they were entitled to succeed, even if no payment prior to 1864 was shewn. They considered that they had evidence of such payments, but the Vice-Chancellor was so strong in their favour on the effect of the subsequent payments, that he did not admit evidence. The Defendant tendered no evidence that no payment to *John Sanders* or persons claiming under him had been made prior to 1864, and relied on the view that the admissions shewed that no rent had been paid to the Plaintiffs or those from whom they claimed prior to 1864, and that the subsequent payments could not restore their title. He was not taken by surprise, except that he took an erroneous view of the admissions, and, therefore, chose to conduct his case without adducing evidence. Now, the admissions do not warrant the inference which the Defendant wishes to draw from them. The payment of a moiety of the rents for thirteen years is good evidence that a moiety was paid previously. There is nothing in the admissions to negative this, and the result is that we have before us no evidence that the Defendant's father was in sole possession before 1864 without accounting. The *Statute of Limitations*, therefore, is out of the case, and the Plaintiffs are entitled to judgment.

The Appellant has applied for leave to adduce fresh evidence, but I am of opinion that it ought not to be granted. The application is for an indulgence. He might have adduced the evidence in the Court below. That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in Court. The exact point on

which evidence is wanted having thus been discovered, to allow fresh evidence to be introduced at that stage would offer a strong temptation to perjury. Moreover, speaking for myself, I think that when an application is made for an indulgence, the moral elements of the case ought to be taken into consideration. I am more inclined to grant it when what appears to be a substantially good and honest case is in danger of being defeated on technical grounds, than in favour of an attempt to defeat a good case on technical grounds. Here are two brothers, one of whom, supposing that he had been in adverse possession up to 1864, must be considered as saying to the other in that year, "I am sorry that I have so long held possession against you; I will pay you half the rents from this time." He does so till his death in 1877. His son at first continues the payment, but then turns round, refuses to make any further payment, and sets up the *Statute of Limitations*. Now, supposing it could be proved, which I much doubt, that *Thomas Sanders* was in sole possession for twenty years prior to 1864, so as to be entitled to set up the statute, is the case one for indulgence, in order that against what I will call his repentance and his better judgment the moiety which originally belonged to his brother may be handed over to his son by virtue of the statute? The Court having a discretion as to such an application, I am of opinion that it should be exercised in favour of the representatives of *John Sanders*.

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BAGGALLAY, L.J.:—

This is an action by the representatives of one tenant in common against the representative of the other. The defence set up is that the right of the Plaintiffs is barred by the *Statute of Limitations*. The Vice-Chancellor has decided in favour of the Plaintiffs, and I agree in his conclusion though not in his reasons. He seems to have held that, after a title under the statute had accrued through adverse possession, a subsequent acknowledgment would prevent the operation of the statute, and in support of that proposition he relied on *Stansfield v. Hobson* (1). The marginal note of that case is in point, but when we look at the judgments the only point considered in them is whether the document in

(1) 3 D. M. & G. 620.

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question was in such a form as to make it a sufficient acknowledgment within the statute. Having regard to this, I cannot consider that *Stansfield v. Hobson* (1) is an authority in favour of the proposition that an acknowledgment given after the statute has run is effectual. The point was considered in *In re Alison* (2), and the Court of Appeal there expressly decided that when a statutory title had accrued by the expiration of the twenty years, it could not be defeated by a subsequent acknowledgment. I therefore cannot agree with the reasons given by the Vice-Chancellor.

I think, however, that his judgment may be supported on another ground. The facts are to be gathered from the admissions. It appears from them that for thirteen years the tenant in common, through whom the Defendant claims, regularly accounted to the other for his share of the rents. It is said that the Defendant's predecessor in title was in sole possession for many years previously, but there is nothing in the admissions to shew that he did not account to his co-tenant for a share of the rents. The accounting for thirteen years is strong evidence that the other co-tenant had a right to require an account, and, there being no evidence to rebut this, the Plaintiffs are entitled to succeed.

The Defendant has applied for leave to adduce fresh evidence. Having found out that according to the true construction of the admissions they do not establish his case, he wants to be allowed to prove that they do not shew the real facts. He refers to Order LVIII., rule 5, which authorizes the Court to give leave to adduce fresh evidence on special grounds. What special grounds does he allege? Only, in fact, that his advisers took a wrong view of the effect of the admissions. I do not think that we ought to consider that a special ground.

LUSH, L.J.:—

If it had been proved that for twenty years before 1864 no payment or acknowledgments had been made by *Thomas Sanders* the son to *John Sanders* or persons claiming under him, then I think that no acknowledgment after 1864 would give them a title, and that no payment of rents after that year would give them a title unless it was continued for such a period as to give a

(1) 3 D. M. & G. 620.

(2) 11 Ch. D. 284.



new statutory title. We have, however, no evidence but the admissions. It has been urged that we may infer from them that for more than twenty years *John Sanders* did not participate in the rents. I cannot read the admissions as going to that extent. The first appears to me to express no more than that one tenant in common entered into receipt of the rents of the whole estate, and continued in such receipt till his death, not that he received them all for his own benefit. It is quite consistent with the terms of the admission that *Thomas*, up to 1864, paid one-half of the rents over to his brother. Then the third admission states a payment of a moiety of the rents from 1864 to the solicitors of the mortgagees, but there is not a word to negative their having previously been paid to the mortgagor. It is quite consistent with the admissions that they may have been so, and I think it most likely that they were, for it is not probable that *Thomas Sanders*, if he had acquired a statutory title, would, without any assignable reason, have begun in 1864 to pay a moiety of the rents to the Plaintiffs, and continued to do so till his death in 1877. It would, I think, be wrong to infer from these admissions that no payment in respect of the rents was made by *Thomas Sanders* before 1864. Therefore, though differing from the reasons of the Vice-Chancellor, I think his judgment ought to be affirmed on the ground that the reasonable inference of fact from the admissions is that a moiety of the rents was paid to *John Sanders* up to 1864, and that no change took place in that year except that it was thenceforth paid to the solicitors of his mortgagees.

Solicitors for Plaintiffs: *Williamson, Hill, & Co.*

Solicitors for Defendant: *Gold & Son.*

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C. A.

*In re* WATSON (A PERSON OF UNSOUND MIND).

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Dec. 3.

*Lunatic Trustee—Trustee Act, 1850, s. 5—Order vesting Right to Stock in the other Trustees.*

One of three trustees of a sum of stock had been found lunatic. The fund having become divisible, a petition intituled both in Lunacy and in Chancery was presented for the appointment of a new trustee and a vesting order:—

*Held*, that the appointment of a new trustee was unnecessary, and that the petition ought to be intituled in Lunacy only. Order made vesting the right to call for a transfer of and to transfer the stock in the two trustees who were not under disability.

*In re Nash* (1) not followed.

*JANE DALE*, widow, died in 1856, having made a will, by which, in exercise of a general power, she appointed one moiety of a sum of £2000 consols to her son *Henry Dale*, and the other moiety to her son *James Dale* for life, and after his death to *Henry Dale*, subject to certain other limitations if he should die in the life of *James Dale*, and appointed three persons trustees to carry the trust into execution. Shortly after her death one-half of the fund was transferred to *Henry Dale*, and the other moiety to the trustees named in the will. By an order in Chancery dated the 9th of June, 1873, *F. J. Prescott* and *H. Aveling* and *Alfred Watson* were appointed trustees of this moiety represented by £1007 2s. 3d. Reduced £3 per Cent. Annuities in the place of the former trustees. The fund was afterwards reduced to £878 11s. 9d. £3 per Cent. Reduced Annuities.

*James Dale* had died in 1879, so that the fund was now divisible.

*Watson* having been found a lunatic, *Prescott* and *Aveling* presented a petition asking that *J. C. Pawle*, or some other fit person, might be appointed to be trustee of the fund jointly with the Petitioners, and that the right to call for a transfer and to transfer into their own names the £878 11s. 9d. stock, and to receive any dividends accrued or thereafter to accrue thereon, might vest in the Petitioners and *Pawle* as such trustees.

The petition, in conformity with *In re Pearson* (1) and *In re Currie* (2), was intituled in the Chancery Division as well as in Lunacy: see *In re Owen* (3).

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*In re*

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(A PERSON OF  
UNSOOUND  
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*Northmore Lawrence*, for the Petitioners.

*W. Latham*, for the Respondents:—

I submit that it is unnecessary to appoint a new trustee. The 5th section of the *Trustee Act*, 1850, clearly gives the Court authority to vest the right to transfer the stock in the other trustees, and when the fund has become divisible it only causes needless complication and expense to appoint a new trustee.

*Northmore Lawrence*:—

The appointment of a new trustee has been asked for in consequence of the decision in *In re Nash* (4), but the Petitioners do not desire it if the Court considers that it can be dispensed with.

JESSEL, M.R.:—

In my opinion the 5th section of the *Trustee Act*, 1850, clearly gives jurisdiction to vest the right to transfer the stock in the two other trustees, and where there is no object to be attained by appointing a new trustee it only causes useless expense to appoint one. The case is plainly within the terms of the section, and, notwithstanding *In re Nash*, I think that an order ought to be made vesting the right to transfer the stock in the two trustees who are not under disability. It is clearly unnecessary that such an order should be made in the Chancery Division as well as in Lunacy, and to make it in both would cause useless expense. The petition, therefore, may be amended by striking out the title in the Chancery Division.

BAGGALLAY, L.J., concurred.

Solicitors: *J. H. Hortin*; *Freshfields & Williams*.

(1) 5 Ch. D. 982.

(3) Law Rep. 4 Ch. 782.

(2) 10 Ch. D. 93.

(4) 16 Ch. D. 503.

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Dec. 6.

## HALSEY v. BROTHERHOOD.

[1879 H. 111.]

*Patent—Slander of Title—Damages—Injunction.*

25 C.D. 3, 6

The holder of a patent, the validity of which is not impeached, who issues notices against purchasing certain articles alleging that they are infringements of his patent and threatening legal proceedings against those who purchase them, is not liable to an action for damages by the vendor of those articles for the injury done to the vendor's trade by his issuing them, provided they are issued *bonâ fide* in the belief that the articles complained of are infringements of his patent. Nor is he liable to be restrained by injunction from continuing to issue them until it is proved that they are untrue, so that his further issuing them would not be *bonâ fide*.

Decision of *Jessel*, M.R. (1), affirmed.

THIS was an appeal by the Plaintiff from a judgment of the Master of the Rolls dismissing his action (1).

*Ince*, Q.C., and *W. W. Cooper*, for the appeal:—

We submit that the Master of the Rolls was in error in holding that there was no case for damages or an injunction. Under the old practice there could not be an injunction to restrain slander of title: *Prudential Assurance Company v. Knott* (2), but this rule is altered by the *Judicature Act*: *Saxby v. Easterbrook* (3). We rely on the law laid down by the Master of the Rolls in this case (4) as sufficient to decide the case in our favour, but we submit that it is erroneous in the distinction it draws as to damages.

[BAGGALLAY, L.J.:—Has not a person who holds patents, the validity of which is not in question, a right to warn people against infringing them?

LORD COLERIDGE, L.C.J.:—Is not *Wren v. Weild* (5) in your way?]

It is so as to damages, but not as to an injunction.

[LORD COLERIDGE, L.C.J.:—Can there be an injunction to restrain an act in respect of which no action would lie?]

(1) 15 Ch. D. 514.

(2) Law Rep. 10 Ch. 142.

(3) 3 C. P. D. 339.

(4) 15 Ch. D. 519, 520.

(5) Law Rep. 4 Q. B. 720, 733.



*Thorley's Cattle Food Company v. Massam* (1) is precisely this case, and *Dicks v. Brooks* (2) is in our favour both as to damages and injunction. That case modifies the doctrine of *Wren v. Weild* (3). It is shewn by *Thomas v. Williams* (4) that if the statement is one calculated to injure the plaintiff's trade, special damage need not be shewn. On the result of the authorities, if a statement is made calculated to injure the plaintiff's trade, is published, and is unfounded in fact, an injunction can be obtained though the statement is made *bonâ fide*. If the defendant threatens actions and will not bring one, it is necessary to justice that the plaintiff should be at liberty to test the truth of his statements at once, otherwise he must submit to have his business injured by untrue statements, and have no remedy. Assuming *Wren v. Weild* to establish that we must shew want of *bona fides*; we say it is shewn by a succession of threats not followed by an action.

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[LINDLEY, L.J.:—I do not see any allegation that you ever made an engine so as to enable the Defendant to bring an action.]

We exhibited one at the agricultural show. The Master of the Rolls decided against us on the ground that we had not averred that the Defendant threatened and intended to go on making his representations; but under the new system of pleading we are only bound to plead facts, not to draw inferences. A mere formal allegation that a defendant threatens and intends to go on doing what he is doing cannot carry a case any higher, and it would be bad pleading to insert it.

[BAGGALLAY, L.J.:—Why should you not be left to bring a fresh action for an injunction?]

The amendment in the present pleadings would be trifling, and the Court will not put us to the expense of a fresh action.

*Aston*, Q.C., and *Chadwyck Healey*, for the Defendant, were not called upon.

LORD COLERIDGE, L.C.J.:—

In this case the Master of the Rolls thought that the statement

(1) 6 Ch. D. 582; 14 Ch. D. 763.

(3) Law Rep. 4 Q. B. 730, 733.

(2) 15 Ch. D. 22.

(4) 14 Ch. D. 864, 873.

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of claim raised no ground upon which either an action for damages could be maintained or an injunction issued to restrain the Defendant from making the statements which were complained of. I am of opinion that the Master of the Rolls was right, and that his judgment ought to be affirmed.

It seems to be clear law that in an action in the High Court in the nature of slander of title, where the defendant has property of his own in defence of which the supposed slander of the plaintiff's title is uttered, it is not enough that the statement should be untrue, but there must be some evidence, either from the nature of the statement itself or otherwise, to satisfy the Court or the jury that the statement was not only untrue, but was made *malâ fide* for the purpose of injuring the plaintiff, and not in the *bonâ fide* defence of the defendant's own property. It seems to be clear that if a statement is made in defence of the defendant's own property, although it injures and is untrue, it is still what the law calls a privileged statement: it is a statement that the defendant has a right to make, unless, besides its untruth and besides its injury, express malice is proved, that is to say, want of *bona fides* or the presence of *mala fides*. The law is so laid down in *Wren v. Weild* (1), a case of great authority, not only from the eminence of the learned Judge who pronounced the judgment, but from the care with which that judgment was given, and the elaborate examination which it contains of all the authorities up to that time. I was at the first view inclined to think that in the case of *Dicks v. Brooks* (2) the rule laid down in *Wren v. Weild* was somewhat narrowed by the Court of Appeal. If that had been so, it would have been binding on us, but on looking at the case that does not seem to be so. It is true that there are expressions in the judgment of Lord Justice *Bramwell* to which Mr. *Cooper* has very properly drawn attention, which at first sight might seem to imply something of the kind, but in the first place *Wren v. Weild* does not appear to have been cited to their Lordships; and next it appears that in that case no damage had in fact resulted from the issuing of the supposed malicious circular. There was therefore nothing upon which either a judgment for damages or an injunction could be founded. It therefore seems to me that

(1) Law Rep. 4 Q. B. 730.

(2) 15 Ch. D. 22.

the case of *Dicks v. Brooks* (1) in no way qualifies the law laid down in *Wren v. Weild* (2).

I base my judgment in this case upon the authority of *Wren v. Weild*. It appears that what has been done here is no more than what was held matter for nonsuit in that case. Here is a Defendant in possession of a patent, who says, and, for all that appears, says with perfect *bona fides* to the Plaintiff and to persons who are going to deal with the Plaintiff, "Remember that what the Plaintiff is making is an infringement of my patent and is an injury to my property, and I tell you that if you proceed to injure my property, I shall take proceedings against you." The result of that may be injury to the Plaintiff. Possibly in this case it has been injury to the Plaintiff. I am quite content to assume that it has, but it appears to me that a statement made under such circumstances does not give a ground of action merely because it is untrue and injurious to the Plaintiff, there must be also the element of *mala fides* and a distinct intention to injure the Plaintiff apart from the honest defence of the Defendant's own property. I feel strongly that there is great force in what Mr. *Ince* has said about the difficulty in which a plaintiff may be placed by the conduct of a person in the position of the Defendant. I do not pretend to be able to answer his observations on that head, but unless there is *mala fides*, it is one of those instances in which the law, in the interests of society, permits an injury to be done without any remedy commensurate with it. My opinion, therefore, is that the judgment of the Master of the Rolls is right, and ought to be affirmed.

I understand (but upon this my learned Brethren are much better authorities than I am) that practically, except as to the question of time, the allowing the Plaintiff to go on with the present action would give him no advantage over that course which the Master of the Rolls has left open to him.

BAGGALLAY, L.J.:—

I am of the same opinion. It appears to me that an action for slander of title will not lie, unless the statements made by the defendant were not only untrue, but were made without what is

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ordinarily expressed as reasonable and probable cause, and this rule applies not only to actions for slander of title strictly and properly so-called with reference to real estate, but also to cases relating to personalty, or personal rights or privileges. The law, as I have endeavoured to enunciate it, appears to me clearly to be deduced from the case of *Wren v. Weild* (1). Therefore, what we have to consider is whether there is any thing to shew that what the Defendant has stated was stated without reasonable and probable cause, even assuming it to be untrue, a question upon which at the present moment we have no means of forming an opinion.

The Defendant's patent must be assumed to be valid, there having been no proceeding by *scire facias* to set it aside, and, assuming it to be a valid patent, he is entitled to all the rights and benefits which it conferred upon him; and I take it to be the result of the case to which I have already referred, that he was entitled to state that the engines manufactured by the Plaintiffs were infringements of his patent, and to threaten proceedings against any person in respect of such infringement, provided he observed the rule that those threats must have been made by him with reasonable and probable cause; unless they are made with reasonable and probable cause, there would be the inference that they were maliciously made. Under ordinary circumstances the question whether there has been reasonable and probable cause is for a jury to decide, and where there is no jury it is for the Judge or Judges before whom the case comes to form an opinion upon it. Each case, as far as regards this portion of it, must, as it appears to me, depend upon its own particular circumstances.

Now here it appears to me that upon the allegations in the statement of claim, with which alone for the present we have to deal, the Defendant has done nothing but what he was entitled to do, and, if so, then there is nothing from which it can be inferred that there was a want of reasonable and probable cause for making the statement. The case of *Thorley's Cattle Food Company v. Massam* (2), upon which reliance has been placed by the Appellant, was not a case of a patent, but of a recipe which the Plaintiff

(1) Law Rep. 4 Q. B. 730.

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possessed. There two documents were issued by the defendant, which were not only false, but which must have been untrue within the defendant's knowledge. There were, therefore, materials from which the want of reasonable and probable cause could be inferred. In *Dicks v. Brooks* (1) the plaintiff might have succeeded, had the evidence been considered sufficient to support his contention. In that case, the plaintiff being about to bring out with the Christmas number of his periodical a pattern to be worked in Berlin wool, and expecting a sale of many thousands of that pattern, the defendant, on the very eve of the publication, issued an advertisement stating to the effect that he had the copyright of the design, and had a right to prevent the issuing of such copies as the plaintiff intended to issue. That was done, as I have said, on the very eve of the issue, and if the circulars of the defendant had been abundantly circulated, it is clear that they must most materially have interfered with the number of copies of the Berlin wool pattern which the plaintiff would otherwise have sold, and the defendant must have known that the issue of the circular would have that effect. Now the defendant had not the copyright in the design, but only in a particular engraving. Therefore, on the whole, there was a want of reasonable and probable cause for issuing of that circular. The plaintiff eventually failed, because it turned out that only three copies of the circular had been issued, all the others having been withdrawn, and that those three were issued in such quarters that no measurable damage could have arisen from them. Mr. *Ince* is quite right in relying on the principle enunciated in the judgment in that case, but I must refer to some further observations of Lord Justice *Bramwell* (2): "Every man has a right to say, 'I am the proprietor of such and such a print, and I warn all the world, and you in particular, not to pirate it.' If the defendants had merely said that, and then gone on to say, 'We warn you that a chromo-lithographic copy, or reproduction of it, although designed for Berlin wool purposes, is a piracy,' although, according to our opinion, they would have been wrong in their law with respect to its being a piracy, I think their saying so would not have been actionable, because a man is not bound to be correct in his statement of the law, though

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he is bound to be correct in his statement of facts. But there is an expression in the circular which makes me think that it would have been actionable if damage had been traced to it." Then he went on to say that there the defendant made a statement which might reasonably be regarded as a statement of fact, and not merely of the defendant's view of the law, and that is the distinction between that case and the case with which we are now dealing. There is nothing in the allegations on the face of the statement of claim to shew that the statements of the Defendant were made otherwise than honestly and fairly, and there is no suggestion in the statement of claim from which it can be inferred that there was a want of reasonable and probable cause for those statements.

On the second ground I agree also in thinking that the Master of the Rolls was right in dismissing the action without prejudice to the right to bring a fresh action, instead of allowing the action to proceed by amendment of the statement of claim, which would probably have led to a very great increase of the costs.

LINDLEY, L.J. :—

I am also of opinion that the course taken by the Master of the Rolls in this case was right ; and it appears to me, having read the statement of claim, that this action was based upon a theory which is erroneous, that is to say, upon a theory that the Plaintiff is entitled to damages or an injunction for untrue statements as to his title, irrespectively of the question whether the Defendant has acted *bonâ fide* or not.

As regards the right to damages, the case is covered by *Wren v. Weild* (1) ; and I do not think that anything which fell from Lord Justice *Bramwell* in *Dicks v. Brooks* (2) was intended to modify the law there laid down. *Wren v. Weild* comes to this : if I am a patentee, so long as I act honestly I am entitled to say, without running the risk of having an action for damages brought against me, that somebody is infringing my patent, or that somebody else's manufacture is an infringement of my patent. If I say that honestly, I am not liable to an action for damages. If I say it dishonestly, I am so liable, and if I know that what I say is

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untrue, it would not take much to persuade a jury that I was acting dishonestly, and then an action for damages would lie. The absence of reasonable and probable cause would be proved as against anybody who kept on making such allegations dishonestly; but so long as the patentee makes such allegations honestly, *Wren v. Weild* (1) shews that no action lies against him. It seems to me also that no injunction will lie against him so long as he acts honestly. But if it is proved that his statement is false to his knowledge, and there is reason to suppose that he intends to repeat those false statements, an injunction ought to lie, because he would be about to do that which he has no right to do. That, however, is not the theory upon which this action is brought. This action is brought upon the theory that the question of honesty or dishonesty is immaterial. That appears to me a mistake, and I think the Master of the Rolls was right in dismissing the action without prejudice to any other action based upon different principles. I do not think the Master of the Rolls dismissed this action simply upon the ground that there was no allegation of a threat or intention to continue the representations. He looked at the substance and saw that the action was based on what he considered an erroneous principle. I think he was right, and that on the whole it is better to dismiss this action, and leave the Plaintiff at liberty to bring a fresh action if he can on a different theory, than to give him liberty to amend.

Solicitors for Plaintiff: *Sandom, Kersey, & Knight*.

Solicitors for Defendant: *Cope & Co.*

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[1879 C. 238.]

March 29, 30. *Partnership—Composition—Joint Creditors—Creditors with Joint and Separate Security—Valuation of Proof for Joint Debt—Close of Composition—Action for Redemption of Security—Claim to retain Separate Security—Amendment of Proof.*

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Dec. 8.

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between *Knight* of the one part, and the Plaintiff *Thomas Couldery*, of the other part, a messuage and premises were demised to the Plaintiff, *T. Couldery*, for twenty-seven years from the 25th of March, 1873.

*Thomas Couldery*, by an indenture of underlease of the 1st of July, 1873, underlet the same premises to Messrs. *Roper & Protheroe* for fourteen years, from the 24th of June, 1873, at a yearly rent of £90.

*Roper & Protheroe*, by an indenture of mortgage dated the 2nd of July, 1873, between themselves of the one part, and the Plaintiffs *Thomas Couldery* and *Thomas William Couldery* of the other part, in consideration of £1100 due from them to the Plaintiffs, covenanted to pay that sum by monthly instalments of £16 13s. 4d. And by the same deed they demised to the Plaintiffs the premises comprised in the underlease of the 1st of July, 1873, except the last three days, subject to the proviso for redemption therein contained.

By the above-mentioned mortgage deed of the 7th of August, 1873, made between the Plaintiff *Thomas Couldery* of the first part, *Thomas William Couldery* of the second part, and the Defendants *Bartrum* and *Harvey* of the third part, in consideration of the sum of £2200 owing from the Plaintiffs, as partners, to the Defendants, *Thomas Couldery* mortgaged by way of demise his leasehold property under the lease of the 11th of June, 1873, with the benefit of the said underlease. And by the same deed *Thomas Couldery* and *Thomas William Couldery*, and each of them, assigned to the Defendants the mortgage debt of £1100 owing to them from *Roper & Protheroe*, and the benefit of all securities for the same. And they also by the same deed assigned to the Defendants the premises comprised in the mortgage of the 2nd of July, 1873, subject to the proviso for redemption subsisting therein under that mortgage, and also to the proviso for redemption contained if the Plaintiffs, or either of them, or the executors or assigns of either, should, on the 7th of February, 1874, pay the Defendants the sum of £2200 and interest, and also such further moneys as should be owing upon the security of that indenture, and the deed contained joint and several covenants by the mortgagors for payment of the rent due.

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The first meeting of the joint-creditors was held on the 20th of March, 1874, when resolutions were passed by the statutory majority of creditors—

(1.) That a composition of 10s. in the pound should be accepted in satisfaction of the debts.

(2.) That the composition should be payable by three equal instalments of 3s. 4d. in the pound on the amount of the debts, at three, nine, and twelve months from the date of registration of the resolution passed at the second meeting. That the debtors should give their joint and several promissory notes to each of the creditors for the amount of the instalments.

(3.) That the security of *J. R. Widgington* be accepted for payment of the last instalment by his joining with the debtors in their joint and several promissory notes to be given for the last instalment.

(4.) That *Read* be appointed trustee.

The Defendant *Harvey* was chairman at this first meeting, and the first signatures to the resolutions were those of *Bartrum, Harvey, & Co.*

At a subsequent meeting of the joint creditors held on the 31st of March, the resolutions were duly confirmed. The Defendant *Harvey*, at the first meeting on behalf of his firm, before voting put in a proof whereby he, on behalf of himself and partner, valued their security at £800, and claimed to prove for £1600, the balance.

In this proof, which was headed, “In the matter of proceedings for liquidation by arrangement or composition with creditors, instituted by *Thomas Couldery* and *Thomas William Couldery*, trading in co-partnership as ‘*Thomas Couldery & Son*,’ wholesale clothiers,” *Harvey* stated that “The Plaintiffs are indebted to me and my partner in the sum of £1600 17s. 5d. for money due to me and my partner under the mortgage of the 7th of August, 1873, whereby they covenanted with me and my partner . . . . to pay £2200 with interest at £5 per annum . . . . and whereby they also covenanted with us that they would . . . . after notice, repay to us such sum or sums as they should hereafter become indebted to us or to the persons constituting the firm of *Bartrum, Harvey, & Co.*, for money advanced from time to time, or for

goods sold and delivered . . . . with interest, &c., which said mortgage was given to me and my said partner to secure to us the said sum of £2200, the amount due at the execution thereof to us for goods bargained and sold and delivered by me and my partners to the said *Thomas Couldery* and *Thomas William Couldery*, . . . . for which said sum or any part thereof I say that I have not, nor hath any of my said partners, . . . . any manner of satisfaction or security save and except the said indenture of mortgage and the property thereby demised and assigned to me and the said *J. Bartrum* by the said *J. C.* and *T. W. Couldery*, the particulars whereof are as follows."

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"The demise by the indenture of mortgage of the messuage and premises which is held by *J. Couldery* for the unexpired residue of twenty-seven years, under the lease of the 11th of June, 1873, subject to the underlease of the same premises, and an assignment by the same indenture of mortgage to *Harvey* and *Bartrum* by *Thomas Couldery* and *Thomas William Couldery* of the sum of £1100, and the benefit of the security held for the same, viz., the mortgage of the 2nd of July, 1873. And the said several documents above described (being the several indentures of lease, underlease, and mortgage above mentioned) which relate to the said security, the value of which security I assess at the sum of £800, and I and my partner claim to be creditors of *T. Couldery* and *T. W. Couldery* for £1600 17s. 5d., the balance of the debt, after deducting the value of the said security."

There was no meeting of the separate creditors.

The composition proceeded on the footing of the resolutions, and all the instalments were paid by the debtors out of their own moneys, including the instalments on the £1600 17s. 5d. The last instalment was paid four years or so before the date of the present action.

The Defendants *Bartrum* and *Harvey* received from *Roper & Protheroe* the sum of £950 (the balance of the £1100 remaining due under the mortgage of the 2nd of July, 1873), and also the rent due under the underlease of the 1st of July, 1873, which sums amounted to considerably more than £800 and interest at 5 per cent. since the date of the assessment.

The Plaintiffs accordingly, in June, 1879, instituted this action

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against *Bartrum, Harvey, & Co., Widgington*, and others (whose interests it is not material to mention), claiming a declaration that *Bartrum, Harvey, & Co.* were entitled to hold the mortgage of the 7th of August, 1873, as security only for the sum of £800, at which they had assessed it, and interest thereon, and asking for redemption and consequential relief.

The Plaintiffs alleged that the lease of the 11th of June, 1873, subject to the underlease, was the separate property of *Thomas Couldery*, and that in the mortgage of the 7th of August, 1873, the said property of *Thomas Couldery* was only a collateral security for the debt of the Plaintiff's firm due to the Defendants.

The Defendants, in their statement of defence, stated that they were aware at the time of the valuation of the very doubtful character of *Roper & Protheroe's* security assigned to them by the Plaintiffs, depending, as it did, on the success of *Roper & Protheroe* in a business which they had just commenced, and that after considerable discussion they assessed the value of their security at £800, and by their amended statement of defence contended that, as secured creditors of the Plaintiffs, they were entitled, as against the Plaintiffs, their debtors, to retain their securities until they had received 20s. in the pound on the amount of their debt, and denied that the property of *T. Couldery* was only a collateral security for the debt of the firm, alleging it formed an important part of the security.

The Defendants, in answer to interrogatories, after saying that they fixed upon the sum of £800 as about a fair value of their security, proceeded: "Our object in making the assessment was to enable the Plaintiffs to know the amount of unsecured liabilities for which they had to provide, and to comply with the *Bankruptcy Act* and the Rules in Bankruptcy."

Ince, Q.C., and *Maidlow*, for the Plaintiffs:—

We submit we are clearly entitled to a reconveyance of the security and to payment of the amount the Defendants, *Bartrum, Harvey, & Co.*, have received in excess of the £800 at which they valued their security, and interest thereon. This is not a case of bankruptcy, in which the debtor is not released from his debt until he has obtained his discharge, but a case of composition

under sect. 126 of the *Bankruptcy Act*, 1869, which empowers creditors to accept a composition "in satisfaction of the debts due to them from the debtor;" so that, in the present case, the debt, beyond the £800 at which the security was valued, has, by payment of the composition, been actually and for ever satisfied: *Bolton v. Ferro* (1); *In re Balbirnie* (2).

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[They were stopped by the Court.]

Roxburgh, Q.C., *Chitty*, Q.C., and *Eastwick*, for the Defendants, *Bartrum, Harvey, & Co.*:—

There is nothing in the *Bankruptcy Act* or Rules depriving a secured creditor under a composition of his security until his debt is fully paid; rule 100 of the *Bankruptcy Rules*, 1870, which requires a secured creditor to pay over the amount produced by his security beyond the assessed value, applying only to a case of bankruptcy or liquidation by arrangement under the Act, and not to a composition: *Ex parte Manchester and Liverpool District Banking Company* (3).

T. Dale Hart, for the Defendant *Widgington*.

JESSEL, M.R.:—

To my mind the point is not arguable. According to English Common Law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. Therefore, although the creditor might take a canary, yet, if the debtor did not give him a canary together with his 19s. 6d., there was no accord and satisfaction; if he did, there was accord and satisfaction. That was one of the mysteries of English Common Law.

But, that being so, there came a class of arrangements between creditors and debtors, by which a debtor who was unable to pay in full offered a composition of something less in the pound.

(1) 14 Ch. D. 171.

(2) 3 Ch. D. 488.

(3) Law Rep. 18 Eq. 249.

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Well, it was felt to be a very absurd thing that the creditors could not bind themselves to take less than the amount of their debts. There might be friends of the debtor who would come forward and pay something towards the debts; or it might be that the debtor was in such a position that, if the creditors took less than their debts, he would have something over for himself and would exert himself to pay the dividend; whereas, if the creditors did not, they would get nothing, or less than nothing, if they incurred costs in endeavouring to get payment. Therefore it was necessary to bind the creditors; and, as every debtor had not a stock of canary-birds or tomtits, or rubbish of that kind, to add to his dividend, it was felt desirable to bind the creditors in a sensible way by saying that, if they all agreed, there should be a consideration imported from the agreement constituting an addition to the dividend, so as to make the agreement no longer *nudum pactum*, but an agreement made for valuable consideration; then there would be satisfaction. Consequently, if the creditors came in and all agreed *inter se* to take 10s. in the pound, the agreement *inter se* supplied the additional consideration which was supposed to be necessary, and the debts were satisfied—so satisfied, that, if one of the creditors obtained an unfair advantage, a Court of Equity actually interfered, and allowed the debtor to recover back the surplus from him, because he was not entitled to take from the debtor anything more than the composition. The principle upon which the creditor was made to repay was, that his debt was satisfied, and that he had no right to take an unfair advantage.

That being so, if a debtor made an arrangement with his creditors who were unsecured, and paid them 10s. in the pound, there was an end of their debts, and not the less so if they were joint and several creditors. Any one of the debtors might satisfy the debt if it was a joint and several debt. The joint debtor or the several debtor might give a horse or a canary-bird in satisfaction; and so he might give a composition in satisfaction, and thus satisfy the debt.

Then there came a class of what were called secured creditors. Our commercial people dealt with secured creditors in this way, and commercial people understand business a great deal better

than Judges: they said, "You, a secured creditor, have got a security: your security is worth half the debt, take it for half the debt, and treat yourself as an unsecured creditor for the rest." That is perfectly intelligible; and on that principle our bankruptcy law was framed. The security was realized: the creditor set it against the debt and proved for the balance. Then there came cases in which it was not convenient to realize the security. It might be a doubtful security, or the creditor preferred to keep it. How was the security to be dealt with then? This contrivance was adopted; instead of directing the security to be valued, as it would be abroad, by an official of the Court, the law allowed the creditor to value it himself, but said, "Now mind, you shall never get any more out of it than the value you have put upon it." That was the check which the law placed upon wrong valuations. The object was to get the creditor to value his security at as high a figure as possible, so that he might prove for as little as possible; and, therefore, when he was told, "Whatever you value it at you shall never get any more than that value for it," of course he would not undervalue his security, because, if he did, he would lose the benefit of it beyond that valuation. That was the theory of the Bankruptcy Law, and that is kept up at the present day. There are express enactments to carry it out, not only in bankruptcy, but also in liquidation by arrangement, which is a modified bankruptcy, and by which, if a creditor gets more than his value of his security, he is liable for the surplus. But when we come to composition there is no such enactment required. In bankruptcy or liquidation by arrangement it was required, because, under the Bankruptcy Law, the dividend was not necessarily a discharge of the debt. The bankrupt himself was not discharged unless he got his certificate of discharge; and in many cases he remained liable notwithstanding his certificate; therefore an express provision was wanted. But in the case of composition, where the secured creditor comes in voluntarily and accepts the composition, he is a party assenting to the discharge of the debt and to the discharge of the debtor: he has accepted satisfaction, and no further provision is required.

Then the only question is, On what terms has the secured creditor accepted satisfaction? What is satisfied? Why, the

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part of the debt that he has treated as unsecured. He says, for instance, in the present case, "I agree that my security shall stand for £800, and I will take a composition for all the rest of my debt." Then all the rest is satisfied; and how can he hold security for more than is due to him? I therefore decide that *Bartrum, Harvey, & Co.* are entitled to retain their mortgage as from the date when they assessed its value, as security only for the £800 at which they assessed it, with interest thereon, and that they must pay over to the Plaintiffs the difference between that £800 and interest and the total sum received by them, *Bartrum, Harvey, & Co.*

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C. A. From this decision the Defendants, *Bartrum, Harvey, & Co.*, appealed.

The case came on to be heard on the 8th of December, 1881.

*De Gea*, Q.C., and *Eastwick* (*Davey*, Q.C., with them), for the Appellants:—

The Defendants were secured creditors of the partnership firm, *i.e.*, creditors with a security on the estate of the bankrupts. The Plaintiffs' composition was by them as partners with their joint creditors in respect of their joint debts, for which the joint estate is liable, and the security held by the Defendants upon the separate property of the elder Plaintiff ought not to have been deducted from the proof.

The question is whether the Defendants, by improperly including a security which they were not bound to value, and so proving for too little, have now lost their right to the separate security.

[LUSH, L.J., referred to *Williams v. Hopkins* (1).]

The Defendants do not dispute the right of the Plaintiffs to redeem their joint property on paying the £800 and interest, but they have no right to redeem the separate security until they have paid us upon it in full. The composition in respect of the joint debt is no satisfaction of the separate debt: *Simpson v. Henning* (2).

At all events, leave should be given to amend the proof: *Ex*

(1) 18 Ch. D. 370.

(2) Law Rep. 10 Q. B. 406.



*parte Schofield* (1). So, in *Ex parte Adamson* (2), it was held that a creditor's election to prove either against the joint estate of the indebted firm or the separate estates of the partners was not lost by the fact that he had already proved and received dividends, but that he might change his election on terms; and in *Ex parte Bagshaw* (3), the Court of Appeal intimated an opinion that if a mortgagee had by mistake omitted from his proof part of his security, he would be allowed to remodel his proof.

[LUSH, L.J.:—In all those cases the bankruptcy or liquidation proceedings were still pending.]

The Defendants are entitled to stand upon the separate security of the elder partner under his separate liability, unless there has been on their part such conduct as to amount to a release of that separate security, or to an equitable estoppel, which would prevent them from availing themselves of it. But we submit that there has been no such conduct on the Defendants' part, and, in the absence of any release or equitable estoppel, the ordinary rules of bankruptcy apply, according to which these Defendants would be entitled to their separate security. The valuation of the debts of secured creditors in a composition is only for the purpose of calculating the majority of votes at the meeting. See the *dictum* of Lord Justice James in *Ex parte Bestwick* (4).

[They also referred to the *Bankruptcy Act*, 1869, s. 16, sub-s. 5; Bankruptcy Rules, 1870, rr. 272, 285.]

*Ince*, Q.C., and *Maidlow*, for the Plaintiffs, and *T. Dale Hart*, for *Widgington*, were not called upon.

BAGGALLAY, L.J.:—

In the early part of the year 1874 the Plaintiffs, who were in partnership, called their creditors together, following the course pointed out by the liquidation clauses of the *Bankruptcy Act*. The Defendants were creditors of the Plaintiffs for £2400. For that sum they held security, and for the purposes of the present decision that security may be said to consist of two parts. There was a mortgage, the joint property of the firm, and also a security

(1) 12 Ch. D. 337.

(2) 8 Ch. D. 807.

(3) 13 Ch. D. 304.

(4) 2 Ch. D. 485, 486.

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by way of demise of property belonging to the elder partner alone. In other words, they had a security on the joint and separate estate. The separate property of the elder partner merely consisted of a lease which had a short time to run and at a rack rent. The other security consisted of a mortgage debt due from Messrs. *Roper & Protheroe*.

The meeting of the creditors of the liquidating debtors was held on the 20th of March, 1874. At the first meeting resolutions were passed for a composition upon the terms of a payment of 10s. in the pound on the amount of the debts proved by three instalments, payment of the last instalment to be secured by a surety. These proposed terms were accepted and carried out, and the composition paid on all the debts proved, including that of *Bartrum, Harvey, & Co.* The arrangement was all completed and the composition closed more than four years before this action commenced.

Amongst those who attended the meeting of creditors and supported the resolution for composition, were the Defendants. Of course they had to tender their proof before voting at the meeting, and, adopting one of the courses available for secured creditors, they valued their security and proved for the balance. They valued their security at £800, and proved for the difference between that sum and £2400. They received dividends on the balance.

The Plaintiffs, treating themselves as simply liable on the security for the sum of £800, and more than that sum having been received on account of the security of the joint estate, commenced a redemption action, alleging that the security was for £800 only—that the Defendants had realized more than £800, and claimed the balance. That claim is resisted on the ground that, though there was a release as regards the security of the joint estate, there was none as regards the separate security.

Reference, however, has been made to the proof of the Defendants, and on looking at it we find the nature of the security is stated in very large terms. They distinctly set forth the security on the elder partner's property, and also the security on the joint property, and they say—or rather *James Harvey*, one of the Defendants' firm, says—"the value of which security I assess at the

sum of £800, and I and my said partner claim to be creditors of *T. Couldery* and *T. W. Couldery* for the sum of £1600 17s. 5d., the balance of the said debt after deducting the value of the said security." Any language more clearly shewing that they valued the compound security at £800, and not the security on the joint property alone, cannot be conceived. It is said that they were not bound to value both securities, but only the joint security, and might leave the separate security alone. No doubt they might have omitted the separate security. But, so far from there being any mistake in valuing this separate security, the whole thing is clear to their minds. Answers and conversations were referred to as shewing what they intended to do, and they wind up in the third paragraph of their answers to interrogatories as follows: "Our object in making this assessment" (*i.e.* of the security at £800) "was to enable the Plaintiffs to know the amount of unsecured liabilities for which they had to provide." The sole object was to put the Plaintiffs in the position of knowing or ascertaining what the liability would be for which they would have to provide the composition. If the view of Mr. *De Geex* is right, that we ought to amend, or treat as amended, the proof of the Defendants, so as to reduce it to the joint security alone, the practical effect would be to increase the amount of the balance on which the Plaintiffs would have to pay the composition, and at the same time deprive them of a large amount of the assets which afforded the means of paying the composition. It is too late now, at any rate, to say, "We want to put matters back in their former position." It would be inequitable in the Court, in a case where there has been a misconception like the present, and where creditors have found that they have put in their proof in a form which is not beneficial to them, to allow them to put it in a different form. This is enough to settle the appeal.

I proceed on the ground that the composition proceeded on the faith of the valuation mentioned in the proof being a proper and sufficient valuation, and binding and conclusive on all the parties. No doubt the result has proved that the estate has realized more than was expected, but at the time when the composition resolutions were passed it was doubtful what the estate would realize, and it is very likely that the proof which they made was a very

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wise proceeding, and as these composition proceedings have gone on upon this footing it is impossible now to unsettle a transaction like this after a period of six years.

Many cases have been referred to in which creditors have been allowed to amend their proofs, but these amendments have been made in the course of the bankruptcy proceedings, whereas in the present case the attempt is made many years after the close of the composition. On these grounds I am of opinion that this appeal must be dismissed.

LUSH, L.J.:—

I am of the same opinion, and on the ground that it is too late now to disturb an arrangement which was come to in 1874, and has been carried out to its completion.

A secured creditor may, if he please, abstain altogether from proving in the bankruptcy; he may rely on his security; if he wishes to take any part of the debtor's other assets he must, unless he has realized his security, before he is allowed to prove or vote, put a value on his security, and prove for the balance. If he values his security, he is bound by that valuation, subject, possibly, to an alteration if an application for that purpose be made before the bankruptcy or liquidation proceedings have come to an end. However difficult it may be to do so, he must put a valuation on his security, and by that he is bound. If it turns out that the security produces more than the valuation, the creditor must hand over the surplus; if less, he must suffer the loss. Here it was quite clearly intended, on the part of these Defendants, to value both the separate security of the one portion and the joint security of the two. Nothing could be more explicit than the way in which it is put in the proof. [Reads the proof.]

But it is said they were not bound to deduct the value of the separate security—they were only bound to deduct that of the joint security. That is so. But that they did not do, and the consequence of taking the course which they did in fact take, was to cause the compound security to be estimated as of the value at which they put it.

They say very candidly on their answer, and answer to interrogatories, on which I rely as conclusive, because years have elapsed



since the payments were made on the footing of the proof which they put in before the composition: "Our object in making the assessment was to enable the Plaintiffs to know the amount of unsecured liabilities for which they had to provide." The Plaintiffs wanted to pay a composition, they ultimately agreed to pay a composition of 10s. in the pound, that is, in the case of the Defendants, 10s. on the £1600.

If the Defendants had valued their joint security only, they would very possibly have reduced the assessed value of the security they held by, say, for instance, £300, and in that case the amount of the unsecured liabilities for which the Plaintiffs would have had to provide being increased, it is possible that the Plaintiffs would not have agreed to pay, or been able to pay, the composition they did. At any rate, the valuation of the whole security was made to enable the Plaintiffs to know the amount on which composition would have to be paid, and the composition was arrived at on the footing that they would have to pay these Defendants a dividend on the sum of £1600. Possibly, if during the pendency of the proceedings, or if, on reconsideration of the matter, the Defendants had thought it inadvisable to insert into their proof the separate security—possibly in that case, if the proceedings were still pending, they might have been allowed to alter their proof.

But I think that when the composition arrangement was made on the footing of the separate security being also included, and so many years have elapsed since that arrangement was made, it is too late now to disturb it. On that ground the appeal must be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. The question appears to me to be shortly this—What is the effect, when a debtor is compounding with his creditors, of a person who is a joint and separate creditor of the debtor, and has a joint and separate security, proving for his debt and deducting the value of all his securities. It was optional for the Defendants to include or to exclude their separate security. The composition being for joint debts, they were not bound to include their separate security. Perhaps they thought

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that the value of the separate security was not worth much, and they threw it in. Whatever the explanation of their conduct, they did prove for the whole debt, deducting £800 for the value of the security in their proof, and the security mentioned in the proof is a joint and separate security.

They now say that, notwithstanding that, and notwithstanding that creditors and debtors have all proceeded on that footing, they are now entitled, after the lapse of so many years, to fall back on the separate security which they were not bound to include. But can they do that? is it equitable? The debtors say no, because the arrangement went on the assumption that the whole security held by the Defendants, both joint and separate, was valued by them at £800; and because whether it was a mistake or not on their part to include the separate security, it is now too late to try and upset the whole transaction. It appears to me that the Plaintiffs are right, and that it is not proper for the Defendants to fall back now on their separate security.

Mr. *Eastwick* put the case in a different shape, which deserves attention. He says the Defendants can fall back on the separate covenant of the senior partner. I doubt whether they can. It does not, however, appear to be necessary for us to decide that question now; we will dispose of it when it arises.

Solicitor for Appellants: *C. Butcher*.

Solicitors for Respondents: *Tatham, Oblein, & Nash*.

M. W.

*Ex parte* RICHDALE. *In re* PALMER.

*Bankruptcy—Protected Transaction—Post-dated Cheque—Bankruptcy of Payee before Date of Cheque—Duty of Drawer to stop Cheque—Holder for Value—Banker and Customer—Payment of Cheque or Bill to Customer's Credit—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 94.*

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The drawer of a post-dated cheque given for value is under no obligation to stop its payment before its date for the benefit of a third person.

If, for instance, before the date of payment the drawer receives notice of an adjudication of bankruptcy, made against the payee since the delivery of the cheque to him upon an act of bankruptcy committed by him before the delivery, he is not bound, for the benefit of the bankrupt's creditors, to give notice to his bankers not to pay the cheque, and thus expose himself to the risk of an action by a *bonâ fide* holder of the cheque for value.

If the cheque was originally delivered by the drawer to the payee, in good faith and for value, and without notice of an act of bankruptcy previously committed by the payee, on which an adjudication is subsequently made, the transaction is protected by sect. 94 (sub-sect. 3) of the *Bankruptcy Act*, 1869, and the trustee in the bankruptcy cannot recover the amount of the cheque from the drawer.

Decision of *Bacon*, C.J., reversed.

When a customer pays a cheque to his bankers with the intention that the amount of it shall be at once placed to his credit, and the bankers carry the amount to his credit accordingly, they become immediately holders of the cheque for value, even though the customer's account is not overdrawn.

*HENRY PALMER* carried on the business of a licensed victualler at the *Sheepbridge Inn*, near *Chesterfield*. The house was his own freehold property. On the 15th of July, 1881, he entered into an agreement with Messrs. *Richdale & Tomlinson*, brewers at *Sheffield*, for the sale to them of the house for £2300, and also of the fixtures, fittings, &c., therein for a price to be fixed by valuation. A deposit of £5 was then paid by them. The purchase of the house was completed on the 28th of March, and the balance of the £2300 was then paid to *Palmer*, but the valuation was not made until the 22nd of April. On that day the fixtures, fittings, and proportion of unexpired wine and spirit licenses were valued at £228 9s., and the stock-in-trade was valued at £21 18s. 10d., making a total of £250 7s. 10d. to be

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paid to *Palmer*. Against this there was due from him to *Richdale & Tomlinson* a sum of £54 13s. 3d. for rent of the house since the 28th of March, the value of goods supplied by them to him, and the charges of the valuer, leaving a balance of £195 14s. 7d. due to him. On the 25th of April, a Mr. *Pogson*, who was the cashier of *Richdale & Tomlinson*, went to the house to settle the account for the valuation, and to take possession for them. *Palmer* was not at the house, he being at *Birmingham* with his nephew, a Mr. *Alfred Palmer*, but his wife was at the house. *Pogson* left with her a cheque for £195 14s. 7d. drawn by *Richdale & Tomlinson* upon their bankers, the *Sheffield Banking Company*, and payable to *Palmer's* order. The cheque was post-dated the 28th of April, the reason for this being that the licenses could not be transferred without a written authority signed by *Palmer*, and *Richdale & Tomlinson* wished to be able to stop payment of the cheque in case this authority should not be given. After the cheque had been delivered to Mrs. *Palmer* she gave up possession of the house to *Pogson*. The cheque was sent to *Palmer* at *Birmingham*, and he endorsed it to *Alfred Palmer* in order that he might get the money from him. *Alfred Palmer* endorsed the cheque to his own bankers, the *Birmingham District Banking Company*, and handed it over to them on the 28th of April, in order that they might place the amount of it to his credit, which they did the same day. The cheque was afterwards paid to them by the *Sheffield Banking Company*.

*Palmer* was adjudicated a bankrupt in the *Sheffield County Court* on the 27th of April, on a petition presented the previous day, upon an act of bankruptcy which he had committed on the 14th of April. Notice of the adjudication was served on *Richdale & Tomlinson* on the 27th of April, but they took no steps to stop payment of the cheque. They had no notice of the act of bankruptcy at the time when the cheque was given to *Palmer's* wife. The licenses were transferred to *Richdale & Tomlinson* after the adjudication. The trustee in the bankruptcy applied to the County Court for an order that *Richdale & Tomlinson* should pay the £195 14s. 7d. to him. The Judge refused the application. The trustee appealed to the Chief Judge. The appeal was heard on the 21st of November, 1881.



*Winslow, Q.C., and Kenyon Parker, for the Appellant :—*

As against the trustee, payment by means of the post-dated cheque was wholly bad, and the Respondents are bound to repay the money to the trustee.

If this had been a payment made before the adjudication without notice of an act of bankruptcy, it would have been protected by the 94th section of the statute. But we rely on the evidence as shewing that on the 25th, when the Respondents handed the cheque to Mrs. *Palmer*, they knew perfectly well that *Palmer* had absented himself with intent to defeat or delay his creditors; and secondly, we say that, as payment of the money was not, and could not have been, made until the 28th, and as the order of adjudication was made on the 27th, this was not a payment made before adjudication.

When a debt is paid by means of a cheque, the debt is not extinguished till the money is paid: *Cohen v. Hale* (1). Right of action against the debtor is suspended from the moment the cheque reaches the hands of the creditor; but if the money be not paid upon presentation, the debt is treated as subsisting, and as having subsisted all along. In this case the debt was not extinguished until the 28th; in other words, there was no “payment before adjudication” within the meaning of the statute.

*In re Beak's Estate* (2), where the delivery of a cheque was held not to be a good *donatio mortis causâ*, the payee not having presented the cheque till after the death of the drawer was known to the bankers, is an illustration of the principle that delivery of a cheque is not present payment.

There is no hardship; the Respondents were plainly favouring the bankrupt. We say they knew of the act of bankruptcy; whether or not, they cannot deny that they had notice of the adjudication, yet they took no trouble to do even what the railway company did in *Cohen v. Hale*, namely, stop the cheque, when they had been cautioned, and knew that the money no longer belonged to the bankrupt.

*E. Cooper Willis, and Bigham, for the Respondents :—*

Without disputing the act of bankruptcy, we deny that the

(1) 3 Q. B. D. 371.

(2) Law Rep. 13 Eq. 489.

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fact of the departure of the bankrupt with intent to defeat or delay creditors was known to the Respondents.

Upon the other point, it has been held that a post-dated cheque cannot be distinguished from a bill of exchange at the number of days' date for which the cheque is post-dated: *Forster v. Mackreth* (1). "A cheque is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's:" per Master of the Rolls in *Hopkinson v. Forster* (2).

At any rate there is no remedy in bankruptcy. This Court has no jurisdiction to make an order for payment of a simple money demand. *Ex parte Dickin* (3); *Ex parte Musgrave* (4).

The contention of the Appellant involves this, that if *A.* delivers a post-dated cheque to *B.*, and afterwards receives notice of an act of bankruptcy, it is incumbent upon *A.* to stop payment of the cheque, and if he fails to do this he must pay the money over again. But this document, being equivalent to a bill of exchange, might, for anything the drawer knew, have been negotiated for value by the payee, and be in a stranger's hands, and in such a case, if the drawer had stopped the payment, he would have been liable for the loss.

As the cheque was in this instance not negotiated, it was the duty of the bankrupt to pay it over to the trustee instead of passing it to his nephew to collect. The Appellant is not answerable for this default. It has been said that the payment by the bankers was a payment by the Respondents after adjudication, and therefore void. The answer is that when the Respondents gave the cheque, the transaction, as far as they were concerned, was complete.

BACON, C.J.:—

The question here certainly has the merit of being one of extreme simplicity.

In the course of the discussion I suggested that there was no question of fact in dispute between the parties, and having heard the evidence I remain of the same opinion. The purchase of the

(1) Law Rep. 2 Ex. 163.

(2) Ibid. 19 Eq. 74, 76.

(3) 8 Ch. D. 377.

(4) 10 Ch. D. 94.

property was completed except as to the value of the fixtures when ascertained. The value was ascertained, and the amount, after deducting the private account of the brewers, came to £195 14s. 7d. Then the transaction was closed, and a cheque for £195 14s. 7d. was given to the bankrupt by the hands of his wife. But as the licenses, which are an important part of a public-house business, had not been handed over, the purchasers bethought themselves of the expedient of giving a post-dated cheque, enabling them to stop the payment of the money if the licenses were not handed over.

Now, whether this instrument be called a cheque or a bill of exchange, it is simply an acknowledgment to the bankrupt that the Respondents owed him £195 14s. 7d., but with this proviso, that although they owed it to-day, they did not mean to pay it until three days afterwards. The relation between debtor and creditor was complete when that cheque was given. It was handed to the wife, who gave it to her husband, and he delivered it to his nephew, who paid it into his own bankers' account. Then, on the 27th, the adjudication took place, and when notice of the adjudication was given to the Respondents payment of the cheque became due, not to the bankrupt, but to the trustee. I do not say whether or not it was incumbent on the bankers to pay to the trustee, but it certainly was incumbent on the purchasers to stop the payment when they knew that the money had become payable to the trustee. No argument founded on questions relating to bills of exchange or *donationes mortis causâ* has anything to do with the matter. Before the 28th of April arrived the Respondents had, as they admit, valid notice of the trustee's claim, and knew that they could not safely pay to anybody but the trustee.

A case more clear in its evidence was never presented to the Court. The Respondents owed the bankrupt £195 14s. 7d. They paid that debt by a cheque which was not payable before the day arrived on which they had clear notice that the money was not payable to the bankrupt but to some one else. Nevertheless they allowed this portion of the bankrupt's estate to get into the hands of a person other than the person entitled to receive it, and they must pay the money over again.

I must allow the appeal, by discharging the order of the

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County Court and ordering the Respondents to pay this sum to the trustee.

J. B. D.

From this decision *Richdale & Tomlinson* appealed. The appeal was heard on the 19th of January, 1882.

*E. Cooper Willis*, and *Bigham*, for the Appellants:—

If a man accepts a bill of exchange for value, and before the bill becomes due the drawer becomes bankrupt, there is no obligation on the acceptor to stop the payment of the bill; he must pay the bill when it becomes due. The same principle applies to a post-dated cheque, which is equivalent in law to a bill of exchange. Even if we had notice of the adjudication on the 27th of April, it was not our duty to stop payment of the cheque.

[JESSEL, M.R.:—How can you stop a cheque? You may give notice to your bankers not to pay it, but, if the cheque has been given for value, the notice will be of no avail.]

If we had stopped the cheque we should have been liable to an action by the holders.

The evidence shews that the cheque was in the hands of third persons, who had given value for it, on the 27th of April.

At any rate this is a case in which the Court of Bankruptcy will not exercise its jurisdiction under sect. 72 against a person outside the bankruptcy; it is a mere money demand by the trustee: *Ex parte Dickin* (1); *Ex parte Musgrave* (2).

*Winslow, Q.C.*, and *Kenyon Parker*, for the trustee:—

The principle of *Ex parte Dickin* does not apply, for the trustee has a higher right than the bankrupt himself. The Appellants paid the debt to him after it had become vested in the trustee.

[JESSEL, M.R.:—You had better deal with the merits; this objection appears not to have been taken in the County Court.]

The post-dated cheque was given in order that the Appellants might be able to stop it in case the licenses should not be transferred to them. They took the transfer of the licenses with

(1) 8 Ch. D. 377.

(2) 10 Ch. D. 94.



knowledge of the act of bankruptcy. A cheque is a revocable request to bankers to pay the sum mentioned in it.

[JESSEL, M.R.:—It is not revocable as against a *bonâ fide* holder for value.]

On the 27th of April the Appellants knew of the act of bankruptcy, and yet they allowed the cheque to be paid on the 29th, and took a transfer of the licenses. The cheque was not payment of the debt, and before it became due the debt had vested in the trustee, and ought to be paid to him, unless the transaction was protected under sect. 94 of the *Bankruptcy Act*, 1869 (1). But that section does not apply to such a case.

[JESSEL, M.R.:—Surely sect. 94 (sub-sect. 3) applies. The giving of the cheque was a dealing with the bankrupt. The remedy for the original debt was suspended during the currency of the cheque.

BRETT, L.J.:—The position of the creditor with regard to the debtor was altered. Is not that a “dealing” with the debtor?

JESSEL, M.R.:—*Alfred Palmer's* bankers gave him credit for the amount of the cheque, and they thereupon became holders of the cheque for value: *Foley v. Hill* (2).]

The case of *Schroeder v. Central Bank of London* (3) seems to shew that that is not so. Bankers are not holders for value of a cheque paid to them by a customer unless the customer's account is overdrawn. If so, any one who gets possession of a lost or forged cheque can always get the money by paying the cheque to a banker. The practice of bankers is not to sue on a dishonoured cheque; they return it to the customer who has paid it to them.

[JESSEL, M.R.:—They would sue on it if the customer's account was overdrawn.]

The power of stopping the cheque must be judged of by the

(1) Sect. 94 provides that “Nothing in this Act contained shall render invalid” (*inter alia*)

“(3.) Any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by

a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication.”

(2) 2 H. L. C. 28.

(3) 24 W. R. 710.

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C. A. intention of the drawers in post-dating it; they intended to be able to stop it for one purpose, why should they not for another?

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JESSEL, M.R. :—

This is rather a singular case, but it appears to me that it is clearly within sect. 94 (sub-sect. 3) of the *Bankruptcy Act*. At the time when the cheque was given for the balance of the purchase-money due by the drawers to the payee, the act of bankruptcy on which the subsequent adjudication was founded had been committed by the payee, but the drawers of the cheque had no notice of it. The giving of the cheque, though it was post-dated, was a "dealing" with the bankrupt, and it is made by sect. 94 (sub-sect. 3) a valid dealing, notwithstanding the bankruptcy. What, then, was the duty of the givers of that which was in law a bill of exchange for the balance of some purchase-money due from them? What was their duty when they heard of an adjudication of bankruptcy being made against the payee before the bill became due? Is there any obligation on a person who has in common parlance paid a debt (though it is not in law payment) by a bill of exchange, if the payee becomes bankrupt before the bill matures, to refuse to pay it, or to direct the drawee not to pay it when it becomes due merely for the benefit of the bankrupt's creditors? I am not aware of any such obligation. If, therefore, the giving of the cheque in payment of the debt was originally a valid transaction, everything else follows from it. The person who is ordered to pay the cheque pays it. If the trustee in the bankruptcy had given notice to the bankers not to pay it, that would have been an entirely different matter, but why the drawers should give such a notice I am unable to discover. I never heard of any obligation on the part of the drawer of a cheque given for value to stop the payment of it for the benefit of a third party. The argument assumes that there is some obligation, in case of the bankruptcy of the payee, to do something which there would be no obligation to do in any other case. But there is no such provision to be found in the *Bankruptcy Act*. We ought, however, to consider what would be the result of stopping the payment of the cheque. The person who gave notice to stop it would run the risk of the cheque being in the hands of a *bonâ fide* holder for value, that is to say, he would

run the risk of having to pay the costs of an action by such a holder. Why should he run this risk for the benefit of the creditors of a bankrupt? There is another point, however, which is sufficient to dispose of the present case, viz., that this very thing has actually occurred. *Alfred Palmer* paid the cheque to his bankers, and they placed the amount of it to the credit of his current account. The bankers were the holders of the cheque for value; the moment they credited the amount of it to *Alfred Palmer* it became their property. Therefore, if the drawers had stopped the payment of the cheque on the 28th of April, still they could not have avoided payment of the amount to *Alfred Palmer's* bankers. Clearly, therefore, the original transaction being protected by sect. 94, the trustee in the bankruptcy could have had no claim to the cheque. But I prefer to base my decision on the first ground. The appeal must be allowed.

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BRETT, L.J. :—

At the time when the act of bankruptcy was committed the Appellants were debtors of the bankrupt, and he was their creditor. If things had remained in that position the debt would have belonged to the trustee, and he could have enforced payment of it. But, before the adjudication had been made, and without any notice of the act of bankruptcy, the Appellants entered into a dealing or transaction with the bankrupt. On the 25th of April they gave him a cheque for the amount of the debt, a cheque, not payable on demand, but dated the 28th of April. This was equivalent to giving him a promissory note not payable till the 28th of April. The giving of a promissory note, which is a negotiable instrument for a debt, has the effect of altering the legal position of the debtor with the creditor. Instead of the creditor being able to sue the debtor for the debt at the moment, his right to sue is suspended during the currency of the note. The creditor must wait until the note becomes due, and he must then present it for payment, and receive payment on the note and not on the original debt, unless the note is dishonoured while it is in his hands. If the note is dishonoured he can then sue for the original debt. But the giving of the note alters the legal position of the debtor and the creditor. Is not that a “dealing” with the

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creditor? In a business sense of the word it certainly is. It is a business transaction which has altered the rights of the parties. Is it not a dealing which is protected by sect. 94 (sub-sect. 3)? It seems to me that it is. It is a business dealing, and such a dealing with a bankrupt is a protected dealing. If a transaction with a bankrupt ends in something, it is not to be injured or damaged by reason of a prior act of bankruptcy of which the other party had no notice. Did the transaction in the present case end in something which would give rise to a legal claim? The promissory note was indorsed and would pass by delivery, and it has been delivered, without any notice of an act of bankruptcy, to a bank by the person to whom it was indorsed, in order that the proceeds of it might be placed to his credit. It was delivered on the day on which it became due, in order that the amount of it might be at once placed to his credit, and the bankers placed it to his credit and became immediately holders of the note for value, and it was paid to them by the Appellants' bankers. This was a payment of the original debt, and a payment by means of a protected transaction, and, unless the Appellants were bound to stop the payment of the cheque when they had notice of the adjudication, they could not be called on to pay the debt over again. It comes back, therefore, to this, were they bound to stop the cheque? I know of no legal obligation, arising by contract or by law, upon a person who has given a cheque in payment of a debt afterwards to stop it for the benefit of a third person. If the Appellants had stopped this cheque they would not merely have put themselves in peril, but they would have rendered themselves liable to an action by the *Birmingham Bank*, who were the holders of the cheque for value.

HOLKER, L.J. :—

I am of the same opinion. I think that in effect the handing over of the cheque to the bankrupt was the handing over of a bill of exchange, and that it was a protected transaction within sect. 94 (sub-sect. 3) of the *Bankruptcy Act*. I think also that, when the cheque came into the hands of *Alfred Palmer's* bankers, they were holders of it for value, and that the Appellants were not bound to stop the cheque when they received notice of the adjudi-



cation. It would be a strange thing if, when they could only stop the cheque by running the risk or incurring the obligation of having to pay the money to the holders, they should be bound to pay the money to the trustee because they did not run that risk.

Solicitors for Appellants: *E. Doyle & Sons*, agents for *Binney, Sons, & Wilson, Sheffield*.

Solicitors for Trustee: *Munton & Morris*, agents for *Parker & Brailsford, Sheffield*.

W. L. C.

*Ex parte* FIRTH. *In re* COWBURN.

*Bill of Sale—Statement of Consideration—Deduction of Expenses—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8—Appeal—Evidence—Duty of Appellant—Right to raise new Point in Court of Appeal.*

If the amount of the expenses incident to the preparation of a bill of sale, given by way of mortgage, is deducted from the sum stated in it as the consideration, and the balance only is actually paid by the lender to the borrower, the consideration is not truly stated so as to satisfy sect. 8 of the *Bills of Sale Act, 1878*.

*Ex parte National Mercantile Bank* (1) and *Ex parte Challinor* (2) must be treated as binding authorities only in so far as they decide that, if part of the sum stated in a bill of sale as the consideration is, by the grantor's direction, given at the time of the execution of the deed, applied in satisfying a then existing debt due by him, the money so applied may be properly stated in the deed to be money then paid to him.

It is the duty of an appellant to bring before the Court of Appeal the whole of the evidence, oral as well as written, on which the order appealed from was founded, and if he does not do this, his appeal ought to be dismissed.

The Court of Appeal, however, has power, by way of indulgence, in a case where a note of oral evidence has been accidentally lost, to allow that evidence to be taken over again.

An appellant will not be allowed to raise in the Court of Appeal a point which he did not raise in the Court below, even though there is some evidence in support of it, if the nature of that evidence is such that, by any possibility, the respondent might have been able to rebut it if the point had been raised originally.

ON the 10th of June, 1880, *Sidney Cowburn* and *Samuel Cowburn*, who were manufacturing chemists at *Gomersal*, in *York-*

(1) 15 Ch. D. 42.

(2) 16 Ch. D. 260.

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shire, executed a bill of sale of household furniture and other chattels to *Joseph Freedman*, a money-lender at *Leeds* and other places. The deed contained a recital that *Freedman* (described as the mortgagee) had agreed to lend to the grantors (described as the mortgagor) "the sum of £40, upon having the repayment thereof, together with the further sum of £20, being the amount of interest and expenses attending the said advance, making altogether the sum of £60, secured in manner hereinafter appearing." And the deed was expressed to be made "in consideration of the sum of £40 now lent and paid by the mortgagee to the mortgagor." The deed provided for the reassignment of the property by the mortgagee to the mortgagor on payment by the mortgagor to the mortgagee of the sum of £60, by consecutive monthly instalments of £5 each, the first of which was to be paid on the 10th of July, 1881. A receipt for £40 was signed by the grantors at the foot of the deed, acknowledging that they had received the £40 on the day of the date of the deed. In the latter part of July, 1881, an execution for a sum under £50 was levied on the goods of the grantors, and in consequence of this an auctioneer named *Richardson* was instructed by *Freedman* to take possession of the goods comprised in the bill of sale in accordance with the provisions contained therein. The debtors deposed that *Richardson* seized all their property on the 27th of July. *Richardson* made an affidavit in which he said that, in consequence of the execution, "on the 27th of July I levied the bill of sale, and I advertised the sale of the effects, and I should have sold them had I not been restrained by the order of the Court." He added—that "after I had seized the effects *Sidney Cowburn* informed me that the amount they owed Mr. *Freedman* was £55." The first instalment had been paid on the 10th of July. The sale was advertised to take place on the 30th of July. On the 30th of July the grantees filed a liquidation petition in the *Dewsbury* County Court (under which a trustee was afterwards appointed), and on the same day, on the application of the debtors and of the receiver who had been appointed, an order was made by the County Court restraining *Richardson* and *Freedman*, until the 19th of August, from selling under the bill of sale or otherwise dealing with the property. This order was afterwards

continued to the 29th of September. On the 22nd of September the trustee gave notice to *Freedman* of a motion in the County Court for an order declaring the bill of sale void as against the trustee, on the ground (*inter alia*) that the consideration for which it was given was not truly stated in the deed, and that, instead of £40 being paid to the debtors on the execution of the deed, only £38 10s. was in fact paid to them.

In support of this application affidavits were made by the debtors in which they swore positively that only £38 10s. was paid to them on the execution of the deed, and they said that this sum was handed to them by one *David Marks*, a clerk of *Freedman*, who managed his business at *Leeds*, in seven £5 notes, three sovereigns, and 10s. in silver. They said that they asked *Marks* for £1 10s. more, but he told them that 10s. was deducted for his attendance at their place of business to look at the property, and £1 for the fee of the solicitor who attested the execution of the deed. In answer to this, affidavits were made by *Marks*, by the solicitor, and another agent of *Freedman*, who said that he was present when the deed was executed, and they all positively swore that £40 in cash was paid to the debtors on the execution of the deed. On the hearing of the motion by the County Court Judge, *Freedman's* witnesses were cross-examined, and in the result the Judge disbelieved them, and gave credit to the story of the debtors that the £1 10s. was deducted. And he held, on the authority of *Hamilton v. Chainé* (1), that the consideration was not truly stated in the deed, and declared the deed void as against the trustee.

The Judge was not asked to take a note of the *vivá voce* evidence, and did not take any, and no shorthand writer was employed by the parties to take a note, nor was any note taken by counsel. *Freedman* appealed to the Chief Judge. The appeal was heard on the 5th of December, 1881. The *vivá voce* evidence was not in any way brought before the Chief Judge, but he was informed by counsel that the Appellant's witnesses had been cross-examined before the County Court Judge, but that no notes of the cross-examination could be obtained. On behalf of *Freedman* it was contended that the *Bills of Sale Act* did not apply at

(1) 7 Q. B. D. 1, 319.

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all, because the evidence shewed that, when the petition was filed, the goods comprised in the bill of sale were not in the apparent possession of the debtors. This point had not been taken in the County Court.

*Finlay Knight*, for the Appellant :—

First, upon the evidence, the debtors were paid the full amount of £40 ; secondly, if not, the deduction of the £1 10s. was immaterial ; thirdly, the evidence shews that, at the time of the filing of the liquidation petition, the goods were in the possession of the sheriff under an execution, and thus, according to the doctrine of *Ex parte Saffery* (1), all question as to the validity of the bill of sale as against the trustee is at an end.

As to the second point ; a deduction of £3 10s. for expenses from a sum of £50 paid by the lender has been held not inconsistent with the statement that the consideration was £50 : *Ex parte Nicholson* (2) ; *Ex parte Rolph* (3).

Upon the third point ; the seizure by the Appellant was on the 27th of July ; a sale was advertised for the 30th, and not until the 30th was the act of bankruptcy committed. The possession was not merely formal, as in *Ex parte Lewis* (4), but was an apparent and actual possession, so as to avoid the operation of the 8th section of the *Bills of Sale Act*, 1878.

*J. G. Wood*, for the trustee :—

We deny that £40 was paid, and we say that if the cross-examination could be brought before the Court, the testimony of the Appellant's witnesses would be disproved. The burden is on the Appellant to supply the Court with all the evidence on the point on which he relies. If he fails in this duty, his case on that point must fail.

Assuming, then, that the 30s. was deducted, the bill of sale, not having stated this fact, is void : *Hamilton v. Chainé* (5). Indeed, the recital in this case is rather farther from the truth than the recital was in *Hamilton v. Chainé*.

(1) 16 Ch. D. 668.

(2) 44 L. T. (N.S.) 828.

(3) 19 Ch. D. 98.

(4) Law Rep. 6 Ch. 626.

(5) 7 Q. B. D. 319.



In *Ex parte Charing Cross Advance and Deposit Bank* (1), Lord Justice James expressly says: "The very object of the Act was to prevent the setting forth as part of the consideration that which was retained by the grantor in the shape of interest and expenses," and he proceeds to point out the difference between that case and *Ex parte National Mercantile Bank* (2), where part of the arrangement was that part of the consideration should be applied in payment of a *bonâ fide* antecedent debt, and it was decided that this part of the arrangement need not be stated. This is the ground of the decision in *Ex parte Nicholson* (3).

[BACON, C.J.:—In *Ex parte National Mercantile Bank* I considered the whole transaction to have been a mere sham and a fraud, but the Court of Appeal did not agree with that view.]

The result of the cases is, that a deduction for expenses must be stated.

On the third point, the County Court Judge thought the evidence conclusive.

BACON, C.J. :—

It is not in evidence that there was any testimony given in the Court below which is not now before me; and I cannot allow the question to be argued of whether there was or was not. I say this without prejudice to the Respondent's right to bring evidence to shew that there was, if he thinks fit.

At present the case seems to me to be quite clear. The intention of the provision in the statute was to prevent frauds. With that object it provides that the attestation of the execution shall state that the effect of the instrument has been explained to the maker. It also provides that the consideration shall be truly stated. Whether in this instance the consideration was truly stated or not, I have to decide only upon the evidence that has been adduced before me on this point. If the consideration was not truly stated there remains no other question in the case.

Upon turning to the evidence, I find that the two borrowers say that a sum of £38 10s. only was paid to them. On the other

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(1) 16 Ch. D. 35, 38.

(2) 15 Ch. D. 42.

(3) 44 L. T. (N.S.) 828.

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hand, on the part of the Appellant it has been proved by *Marks* and another man that £40 was paid. It cannot be denied that the instrument speaks of £40 as having been paid to the borrowers. The execution appears to have been regularly attested by a solicitor, it was duly registered, and a certificate of registration has been produced. Upon the evidence, the facts appear to me to be, that £40 was actually paid to the borrowers, and that they afterwards paid back again £1 10s. for expenses. The Act of Parliament seems to have been fully complied with, and unless I am to disbelieve the evidence on the part of the Appellant, I must take that evidence, corroborated as it is by the testimony of the instrument, as conclusive against the debtors' statement.

I think the order of the Court below was wrong, and it must be discharged with costs.

J. B. D.

C. A. From this decision the trustee appealed. The appeal was heard on the 19th of January, 1882.

Millar, Q.C., and *J. G. Wood*, for the Appellant:—

The County Court Judge disbelieved the Respondent's witnesses after hearing their cross-examination, and the Chief Judge has reversed the decision without having before him the whole of the evidence on which it was founded.

[JESSEL, M.R.:—There has been a complete miscarriage. It is the duty of an appellant to produce to the Court to which he appeals a sufficient note of all the evidence upon which the order appealed from was founded.

BRETT, L.J.:—And if he does not, it is the duty of the Court to dismiss the appeal.

Winslow, Q.C., for the Respondent, then agreed to admit a report which appeared in a *Dewsbury* newspaper of the cross-examination of the witnesses in the County Court.]

[This report was accordingly read.]

This evidence proves that the £1 10s. was retained by the grantee, and that only £38 10s. was paid to the grantors. The consideration for the bill of sale was therefore not duly set forth

in compliance with sect. 8 of the *Bills of Sale Act*, 1878: *Ex parte Charing Cross Advance and Deposit Bank* (1); *Hamilton v. Chaine* (2).

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Winslow, Q.C., and *Finlay Knight*, for the bill of sale holder:—

The *Bills of Sale Act* does not apply at all, for the goods were not at the time of the filing of the petition (the 30th of July) in the apparent possession of the grantors, the sheriff being in possession under an execution: *Ex parte Saffery* (3). And *Richardson* on the 27th of July advertised the goods for sale on the 30th of July.

[JESSEL, M.R.:—It appears that this point was not raised in the County Court. If it had been, the trustee might have been able to answer your evidence.]

The debtors' own evidence is that *Richardson* seized all their property on the 27th of July.

As to the deduction of £1 10s., *Ex parte National Mercantile Bank* (4) and *Ex parte Challinor* (5) exactly apply, and shew that the expenses incident to the preparation of the deed may be properly deducted from the sum which is stated in it as the consideration, because the borrower is liable to pay those expenses.

[JESSEL, M.R., referred to *Ex parte Rolph* (6).]

The borrower is bound to pay the fee of the solicitor for attesting the execution of the deed.

JESSEL, M.R.:—

This is an appeal from a decision of the Chief Judge overruling a decision of the County Court Judge, and I must say that, in my opinion, there was a miscarriage on the hearing before the Chief Judge. The County Court Judge decided the case upon evidence of this character, half a dozen affidavits and the cross-examination of five witnesses who had made the affidavits. The cross-examination was oral, and it appears that no request was made to the

(1) 16 Ch. D. 35.

(2) 7 Q. B. D. 1, 319.

(3) 16 Ch. D. 668.

(4) 15 Ch. D. 42.

(5) 16 Ch. D. 260.

(6) 19 Ch. D. 98.

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County Court Judge to take a note of the evidence, and he did not take a note. When the case came on before the Chief Judge, there being no note of the oral evidence taken by the County Court Judge, and no sufficient note of it taken by anybody else, there was no proof before the Chief Judge of what the effect of the cross-examination was, and thereupon he decided the case without knowing what it was, and upon the affidavits only. With great respect to the Chief Judge, it appears to me, as I have already said, that that was a miscarriage. The Appellant was bound, if he appealed, to present to the Chief Judge a sufficient note of the cross-examination. If he intended to appeal he might have got a shorthand note taken of the cross-examination, or he might have had his counsel's note, or his solicitor's note properly verified by affidavit. If he had not intended to appeal, or if by some accident (for accidents will occur) the notes were lost, if the Judge's notes and the counsel's notes were lost, then, of course, he might apply by way of indulgence to the Court of Appeal to have the evidence taken over again, and the Court might or might not accede to that application. But, in my opinion, the Court cannot decide an appeal in the absence of the evidence on which the order appealed from was founded. Before us that defect has been cured by the admission of a newspaper report, which appears to be very full. Therefore we know the evidence which was before the County Court Judge, and we find that the evidence of one of the witnesses for the present Respondent, the solicitor who attested the bill of sale, was entirely disbelieved by him. On cross-examination he said that he did not know whether the £40 was paid. Then we have two witnesses against two witnesses who are swearing exactly contrary to each other, and the County Court Judge, who saw the witnesses, says that he believes the two who made the statement on which the present Appellant relies, and that he does not believe the two on which the Respondent relies. In that state of circumstances it is not the practice of the Appeal Court to overrule the decision of the Judge of the Court below. It has been over and over again stated in many reported cases that it requires a very strong case indeed to induce the Court of Appeal to interfere on a question of fact, when there has been conflicting evidence before the tribunal,

whether composed of a Judge alone or of a Judge and a jury, which has seen the witnesses. Therefore, on the present materials, the Court must come to the conclusion that £38 10s. only was paid to the grantors of the bill of sale, and not £40 as is stated in the body of the bill. If that is so, how can it be said that the true consideration was stated in the deed? It is stated that £20 was kept for interest and expenses, so that we have £20 plus £40, and the bill of sale is given to secure £60. Then it is suggested that the 30s. which was not paid to the grantors was retained by the grantee for expenses incident to the transaction itself. If it was so, in my opinion the consideration is not truly stated. There is a great distinction between a sum of money being advanced on the terms of the lender paying out of it a debt due by the borrower to a third person, a portion of that sum being handed back again to the lender or handed over by him to another person who is a creditor of the borrower, and a sum of money being retained for that which is not truly a debt until after the transaction itself is completed, that is, a sum of money which consists of the expenses of the transaction itself. When a mortgage is completed the mortgagor is liable to pay to the mortgagee the expenses incident to the mortgage transaction. The mortgagee is primarily liable to his own solicitor for those expenses. The mortgagor is liable to pay over to the mortgagee what he pays to his own solicitor, but there is no debt until the transaction is completed. Indeed, it has been decided that, if the transaction falls through, the intending mortgagee cannot recover his expenses from the intending mortgagor, and to avoid that difficulty it has for many years become the practice of solicitors before engaging in a mortgage transaction to obtain an undertaking by the intending borrower's solicitor to pay the expenses. And I have known cases where in very large transactions the solicitor of an intending mortgagee has taken a written contract from the intending borrower to pay the expenses, if the title to the property proposed to be mortgaged should prove not to be a good one. That being so, though it may be true that the borrower would be liable to pay these expenses, yet, in the absence of special contract, he could not be liable until after the deed was executed. Therefore, this sum could not have been properly

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treated in the deed as a part of the costs which the borrower was liable to pay. Moreover, in this particular instance, there was in my opinion no liability on his part to pay those costs. £20 was expressly charged for interest and expenses generally, that is, for the expenses attending the loan. Therefore, there was no additional liability whatever, and consequently there was not in this case even (if I may so call it) an inchoate debt for any other expenses of the transaction.

That would finish what I have to say on this part of the case were it not that our attention has been called, or rather recalled, to the two decisions of *Ex parte National Mercantile Bank* (1) and *Ex parte Challinor* (2). Now I am quite satisfied to take those decisions as they are explained in *Ex parte Challinor* by Lord Justice *James*, who was then presiding in this Court. After stating what he thought the Act meant, he said (3), "But when a man borrows money he generally does so for the purpose of paying his debts, at any rate he ought to employ it in paying them, and if by his direction the money stated as the consideration is applied by the lender in the honest discharge of the borrower's debts, there is no reason for saying that that is not a payment of the money to him. That was the principle of our decision in *Ex parte National Mercantile Bank*, and in that case, besides the promissory notes of the borrower which were taken up, there were deducted some charges for the preparation of the security. It appears to me quite right to deduct the costs of preparing the bill of sale, and the auctioneer's charges for valuing the property, for that is what happens upon every mortgage transaction." Then he goes on: "And it does not seem to me that the money was the less paid to the borrower because part of it was with his consent applied in payment of a debt for costs to his solicitor, which was not indeed strictly payable, because a bill of costs had not been delivered, but which was really owing to the solicitor." It is plain, therefore, that Lord Justice *James*, in dealing with this small sum for costs, thought it was a debt. He treats it on the principle that you can only apply the consideration in the payment of a debt. The fact that the costs of the preparation of

(1) 15 Ch. D. 42.

(2) 16 Ch. D. 260.

(3) 16 Ch. D. 266.

the deed did not become a debt due from the grantee until after the transaction was completed was not present to his mind, and all he intended to decide was that a debt strictly so called, a debt existing at the time, might be deducted. I think that this reconciles the case with the subsequent decisions. But, if it cannot be reconciled, all I can say is, that, though I am bound by the decision in a precisely similar case, I do not feel inclined to extend it any further.

The other point taken was this: The Respondent alleges that the order can be supported on the ground that the possession of the goods had changed before the filing of the liquidation petition. It is quite true that there is some evidence about that, but the point was not taken in the County Court, and the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence. Now the *Bills of Sale Act* does not allow mere possession to prevail against the trustee, because it may be a merely formal, not a real possession. It may be taken for the sake of form only; it may not be a *bonâ fide* possession, or it may not be a continuing possession. We must, therefore, consider what is the evidence of possession on which reliance is placed, and whether it does shew conclusively that such a state of things existed that no answer can be given on behalf of the trustee. It appears to me that the evidence falls far short of that, and therefore that the point cannot now be taken with success. The evidence is that an auctioneer, in consequence of an execution being issued, "levied the bill of sale." What that means I do not know. It was suggested by Mr. *Winslow* that it meant that he took possession. Perhaps it does; but he could not do that, because, according to the statement in his affidavit, the sheriff was in possession under an execution. Therefore it was impossible that he could have taken possession, unless he paid out the sheriff. I am told that he did, but I cannot listen to that statement, as it is not supported by any evidence. Then the auctioneer does not go on to say that he retained possession until after the 30th, nor that he did any ostensible act. All that he proves is that the property was advertised

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for sale. That does not prove possession. A bill of sale holder may advertise the goods comprised in his security for sale without taking possession. Then it is said that an injunction was applied for. But that was an injunction to restrain the auctioneer and the bill of sale holder from taking possession; and it does not shew that they were then in possession. An injunction can be granted against a man who has not taken possession, but who only threatens to take possession when he has no right to threaten. Therefore there is not sufficient evidence to shew that the auctioneer had continued possession up to the time of the filing of the liquidation petition, or that it was an actual *bonâ fide* possession sufficient within the meaning of the Act. Therefore, it appears to me that the appeal must be allowed with costs.

BRETT, L.J.:—

I am of the same opinion on all the points. I will only add that I think that *Ex parte Challinor* (1) and *Ex parte National Mercantile Bank* (2) can only be treated in future as binding authorities in cases which come within the principle enunciated by Lord Justice *James* (3) as the ground of those decisions; that is to say, they are only authorities for saying that, if a part of the money stated in a bill of sale as the consideration paid at the time of its execution is, by the direction of the borrower, given at the time, paid in order to satisfy debts of his then existing, the money so paid may be properly stated in the deed as money then paid to him. Beyond that it seems to me that those cases have no binding authority.

HOLKER, L.J.:—

I am of the same opinion. The only question before the County Court Judge seems to have been whether £40 or £38 10s. was in fact paid to the borrowers. The Judge had the opportunity of seeing the witnesses and noticing their demeanour, and he came to the conclusion that only £38 10s. was paid. I do not think Mr. *Winslow* would argue that, if £40 is stated in the bill of sale as the consideration and only £38 10s. was paid, and there is no explanation, the consideration would be truly stated

(1) 16 Ch. D. 260.

(2) 15 Ch. D. 42.

(3) 16 Ch. D. 266.

within the meaning of the *Bills of Sale Act*. Unfortunately, it appears that the Chief Judge has reversed the decision of the County Court Judge without being made acquainted with the *vivâ voce* evidence upon which that decision was come to. That evidence does not appear to have been in any way before him, and he seems, so far as I understand his judgment, to have come to the conclusion that the £40 was actually paid, mainly because the borrowers had signed a receipt at the foot of the bill of sale for that sum. No doubt it is a very important fact against the borrowers that they signed a receipt for £40, but that is easily explained if you take their account of the transaction. They say they were told that they were paid only £38 10s., because £1 was deducted in order to pay the fee of the solicitor who attested the execution of the bill of sale, and 10s. to somebody else. Now, if they were under a liability to pay £1 to the solicitor and 10s. to somebody else, they would in effect have been paid £40, and that explains why they signed the receipt for it. However, I must say that, if the evidence which has been read from the newspaper report had been before me originally, I should have come to the same conclusion as the learned County Court Judge. Mr. *Winslow* argues in this way: Take the account of the debtors themselves. They say that £1 was deducted in order to pay the solicitor, and 10s. to pay somebody else, and that was a perfectly fair and proper deduction. Therefore the true consideration was stated in the bill of sale. But, unfortunately, there is no evidence that either the £1 or the 10s. was deducted for or applied to the purposes mentioned. Therefore, on the whole, I come to the conclusion that the appeal must be allowed.

Order of the County Court Judge to be restored, and Appellant to pay the costs of the appeal and of the hearing before the Chief Judge.

Solicitors for Appellant: *W. & J. Flower & Nussey*, agents for *Carr & Cadman, Gomersal*.

Solicitors for Respondent: *Hamlin & Grammer*, agents for *B. C. Pullan, Leeds*.

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[1881 R. 680.]

Will—Bequest of Income of Share of Partnership Business—Subsequent Acquisition of the entire Business—Wills Act, ss. 23, 24.

The testator, *William Russell*, by a will, dated in 1857, after reciting that he was carrying on business as an iron manufacturer in partnership with his two brothers, bequeathed all his share and interest of and in the partnership business, and of and in the real and personal estate employed or invested therein, and of and in the partnership debts, securities, and moneys to which he might be entitled at his decease, to trustees, upon trust to continue the business during his wife's life, and to pay to her a sum equal to half the amount drawn out by the two other partners. The wife had a discretion to discontinue the business, and in case the business should be discontinued testator directed the trustees to get in the share then appertaining to his estate in "the said co-partnership trade or business," and, after making good to the wife "one full third share of the profits," invest the same, and pay the income to his wife for life. After the death of the wife, he directed the trustees, out of the profits of his said share and interest in the business, if continued, and out of the trust fund, if the business should have been discontinued, to pay certain pecuniary legacies, and subject thereto to hold the fund in trust for *A. B.*

Testator died in 1881. After the date of the will, he acquired the shares of his two brothers in the partnership and carried on the business, still under the firm of "*Russell Brothers*," as sole owner, until his death. *A. B.* died in the testator's lifetime. The widow had not discontinued the business.

Held, that the will operated upon the whole of the testator's interest in the business at his death, and that the widow took the whole of the income for her life.

WILLIAM RUSSELL, of *Lydbrook*, in the Forest of *Dean*, iron manufacturer, by his will, dated the 18th of April, 1857, after appointing executors, recited as follows:—

"And whereas I now carry on trade or business in partnership with my two brothers, *Edward Russell* and *James Russell*, at *Lydbrook* aforesaid, as manufacturer in iron, and one-third of the capital employed therein, and one-third of the profit thereof . . . and one-third of the messuages, buildings, machinery, implements,

materials, and stock, used and employed in the said trade or business . . . belong to me."

He then demised and bequeathed "all my part, share, and interest of and in the said co-partnership trade or business, and of and in the real and personal estate which may be used, employed, or invested therein . . . and of and in the co-partnership debts, securities, and moneys to which I may be entitled at my decease," to the executors upon trust that they, or other the trustees or trustee for the time being, should continue the trade or business during the life of his widow, *Louisa Russell*, and, so long as "the said co-partnership trade or business" should continue to be carried on by the trustees should, out of the stock of the partnership effects, pay to his said wife a sum equal to one-half of the amount which should be taken thereout by the other partners.

After the decease of testator's wife, he declared that "all my part, share, and interest of and in the said co-partnership trade or business, of and in the real and personal estate which may then be used, employed, or invested therein, and of and in the co-partnership debts, securities, and moneys which may then appertain or belong thereto, subject to the making good and payment to the representatives of my said wife on a general balance of account of one full third share of the annual profits which shall have accrued during her life" from the time of testator's decease, should be upon the trusts thereafter declared.

He then declared that it should be at the discretion of his wife whether the trustees should continue to carry on "my said trade or business" until her death, or should discontinue the same in her lifetime.

He directed the trustees, if the business should be discontinued, to wind up and dispose of the same, and forthwith to get in and convert into money "the part share and interest then appertaining to my estate of and in the said co-partnership trade or business, and of and in the real and personal estate which may then be used, employed and invested therein, and of and in the co-partnership debts securities and moneys," and with the consent of his wife during her life, to invest the moneys arising therefrom, after the making good and payment to his wife of "one full third share

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of" the profits, in the names of two trustees, to be appointed as therein mentioned, upon specified securities. He then declared that the last-mentioned trustees should pay the income of such trust funds to his wife for life; and that after her death the same trust funds should be upon the trusts thereafter declared.

Testator declares, "in case my said co-partnership trade or business shall have been continued up to the decease of my said wife," that immediately after her decease the trustees should stand possessed of "all that my said part share and interest of and in the said co-partnership trade or business, of and in the real and personal estate which may then be used, employed or invested therein, and of and in the co-partnership debts, securities, and moneys which may then appertain or belong thereto, subject and except as hereinbefore particularly mentioned," upon trust to continue the business until out of the profits several legacies thereafter directed to be paid thereout should have been paid; and, in case the business should have been discontinued and wound up during the life of his wife, then he declared that immediately after her death the trustees should, out of the trust funds to arise from the winding-up and conversion thereinbefore authorized, pay and satisfy the said legacies.

Testator then proceeded to specify the legatees by name; and then declared that, subject to the payment of the said legacies, "all that my said part share and interest of and in the said co-partnership trade and business, and of and in the real and personal estate" (&c., as before), or the said trust funds in case the same trade or business should have been discontinued, should be in trust for testator's nephew, *William Thompson*, his heirs, executors, administrators, or assigns.

Testator then made certain specific gifts of a freehold house, and of articles of wearing apparel and household use, and bequeathed his residuary personal estate upon trust, after payment of funeral and testamentary expenses and debts, to invest, and pay the annual income of the fund to his wife for life, and, after her death, to hold the fund in trust for certain legatees thereafter mentioned.

The testator died in 1881, and his will was proved on the 3rd of May in that year. During his life he paid off and took an

assignment to himself of an incumbrance outstanding on the partnership property, and he then acquired the shares successively of each of his brothers in the partnership, and continued to carry on the business as sole owner until his death, under the firm of "*Russell Brothers*." His personal estate was sworn under £18,000, and he left a considerable amount of real estate undisposed of by the will. After his death his widow, the present Plaintiff, continued to carry on the business, and had not exercised her discretionary power of discontinuing it.

The questions were, whether the Plaintiff was entitled to the whole income of the business, or, if not to the whole, to what part or share of it; or whether there was an intestacy as to the income during her life.

The writ having been issued for administration, upon motion by the Plaintiff before the Master of the Rolls, for whose branch of the Division the cause was originally marked, that the action might be forthwith set down on the questions of law arising upon the construction and effect of the will, and that the said questions might be raised for the opinion of the Court, by the production of the probate of the will, and an affidavit of the executor as to the surrounding circumstances, His Lordship, on the 13th of May, 1881, made an order in the terms of the notice of motion.

Robert Campbell, for the Plaintiff, the widow:—

The language of the will is sufficient to pass the whole of the property in the business belonging to the testator at his death. The widow claims that the trustees should hold for the purposes of the first-mentioned devise the whole of the estate, real and personal, invested in the business at the time of the testator's death. The words, "all my part share and interest of and in the said co-partnership trade or business," with the rest of the clause, really govern the whole will. Subsequent expressions there may be having reference to the actual state of things at the date of the will, such as the provision about the amount of the wife's drawings, but in the discretionary clause he speaks of "my said trade or business," without using the word "co-partnership," shewing that that word is not essential. The clause having reference to the winding-up and disposing of the business shews that the tes-

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tator contemplated the possibility of the trustees carrying on business alone, and though there is no express direction there as to the division of profits, the inference is that the profits were intended to be applied according to the circumstances. The testator left a considerable amount of real estate undisposed of, which it must be assumed he contemplated would pass to his heir-at-law. The main purpose was to give a life estate to the wife, and the acquisition by the testator first of a larger share, and then of the whole, of the business, cannot cause an ademption. If a man bequeaths a mortgaged estate, subsequent purchase by him of the equity of redemption does not adeem the legacy. If a testator bequeaths leaseholds and afterwards acquires the fee, the fee passes by the devise: *Struthers v. Struthers* (1). The intention is not to be defeated by the use of the word "co-partnership," though that word was not strictly applicable to the state of things at the death. There is a sense, however, in which it is applicable, because the testator carried on business, though alone, under the firm of "*Russell Brothers*."

*Emuss v. Smith* (2), on which the other side rely, was argued and decided throughout as a case under the 24th section of the Act. It was not followed in *Cox v. Bennett* (3), and was dissented from in *Saxton v. Saxton* (4). Those authorities shew that any presumption which might arise from the facts as to the intention to revoke the legacy is overridden by the statute. Independently of that, the testator's intention has in this instance been sufficiently expressed. Even if it should be held that the wife, if she carries on the business, must do so on the terms of taking only one-third of the profits, yet the words are sufficiently clear, that if the trustees carry on the business, or if they realize, she is to have the whole of the income.

*Bush*, for the trustees.

*Ilbert*, for one of the legatees:—

The testator intended to benefit, first his wife, and then the legatees whom he named, by bequeathing the interest, whatever

(1) 5 W. R. 809.

(2) 2 De G. & Sm. 722.

(3) Law Rep. 6 Eq. 422.

(4) 13 Ch. D. 359.

it might be, that he might happen to have at his death. It would be absurd to hold that all these elaborate provisions have failed, and that there is an intestacy.

*Cozens-Hardy*, Q.C., for legatees who were also some of the next of kin.

*Abraham*, for children of one of the last-mentioned class of legatees.

*Hemming*, Q.C., and *Ingle Joyce*, for the heir-at-law and next of kin :—

The language is not large enough to cover the whole of the interest of the testator at his death. He speaks consistently throughout of “my part share and interest of and in the co-partnership business,” meaning his one-third part or share; and it was not his intention to give any more than this. He never contemplated passing the whole business. The elaborate system of trusts is unnecessary except upon this construction. It has been argued, substantially if not in words, that the *Wills Act* passes every interest existing at the death, even though the words do not cover such interest, and even though the intention be the other way.

Before the *Wills Act*, in order to claim under a devise it was necessary to prove that the words covered the property claimed; and, moreover, it was the law that if a man made further acquisitions of real property they would not pass, and if he altered the quality of his property this amounted to a revocation. The 23rd and 24th sections alter these presumptions of law, but they do nothing more. The first of the rules still remains untouched, namely, that if the words do not sufficiently describe the property it cannot pass. The result of that rule is, that no more than one-third of the testator’s business passes by this devise.

It will be observed that so long as the business is continued by the trustees the wife is not to take even one-third of the profits, if the drawings of the other partners do not amount to two-thirds. If the partners draw nothing the wife is to receive nothing. That shews how foreign it was to the testator’s intention to deal with anything else than a share in the partnership. Then, again, if the

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wife discontinued the business she is, and after the wife's death, her representatives are to have made up and paid to them, over and above the drawings, "one full third share." It is impossible, after that, to say that she can claim more than a full third share of the profits. The rest is given to the testator's nephew, *William Thompson*. The testator, by acquiring the whole, has not enlarged one-third into three-thirds. One-third of the income during the wife's life is to go to her; the rest of the income during her life is undisposed of; that of the personalty goes to the next of kin, and that of the realty to the heir-at-law.

The question as to whether or not there is a lapse after the death of the wife, will not, it is presumed, be decided now.

Another contention, which, being a harsh one, is not pressed on the Court, is, that the gift to the wife has been wholly adeemed. It may be said that, this being a gift of a share in a partnership, and there not being, at the death of the testator, a partnership in existence, the gift has failed altogether; I prefer however to rely on the view that I have already argued.

*Ingle Joyce*:—

Taking the language of the 23rd section of the *Wills Act* literally,—“No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised” (except a revocation) “shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of,”—it is submitted that the latter clause, “such real or personal estate,” refers to the former clause, “any real or personal estate therein comprised,” and the very utmost the Plaintiff can say as to what was comprised in this will is, that it consisted of one-third of the partnership property. All the section can possibly do is to prevent the will becoming inoperative as to one-third only.

[BACON, V.C.:—The whole question is, what is the real and personal estate “comprised in” the will?]

*Ingle Joyce*, in continuation:—

In strictness the section has not much to do with the case, as



appears from *Emuss v. Smith* (1). As to the ground of the decision in that case there can be no doubt whatever, when the decree is looked at (2), "It was declared that the bequest of the leasehold garden and premises was adeemed by the subsequent conveyance of the fee to the testator" (3). The true construction here is, that the testator never meant to refer to anything but a partnership business, and these trusts become insensible and absurd when applied to the state of things which existed at the testator's death. He does not give even a third share in a partnership business; what he gives is one third part of the profits of a partnership business, and at his death there was no partnership business, nor any share in a partnership business, in existence.

There is very little authority on the question, where the subject-matter of the gift is a share in a partnership. Mr. Justice *Lindley*, however, writes (4), "A specific bequest of a share in a partnership will be adeemed if the testator, after he has made his will, leaves the firm and receives his share." For this proposition no case is cited, and the learned writer proceeds, "But so long as he remains a partner, there will be no ademption, although, by some agreement subsequent to the date of the will, the amount of his share may have been varied;" and for this the authority cited is *Backwell v. Child* (5).

*Campbell*, in reply.

BACON, V.C. :—

This is a case of difficulty, on which various opinions may be entertained, and contrary conclusions arrived at, after a study of the authorities and of the principle which governs all the authorities.

The opinion that the testator died intestate so as to deprive his wife of any interest, is, in my opinion, not tenable for a moment. The Court leans against intestacy in all cases, not from compassion, but as a fixed principle of law. The law is opposed to intestacy; and the *Wills Act* proceeds exactly upon this principle, though not recognising it in terms.

(1) 2 De G. & Sm. 722.

(2) Ibid. 738.

(3) See a note by the Editor of

Jarman on Wills, 4th Ed. p. 328.

(4) Partnership, 4th Ed. p. 1075.

(5) Amb. 260.

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In this case the difficulty arises from incidental circumstances which took place after the execution of the will, and it is necessary to advert to the surrounding circumstances. The testator was a manufacturer of iron. He states this himself in his will. That was his business and occupation in life, and at all events a considerable portion of his property was invested in that business. He makes a will whereby he gives all his interest in the business he was carrying on—I am using general words now, to convey my meaning—to provide for the present maintenance of his wife. She or her representatives are to have one-third of the annual profits of carrying on the business, and she is to be at liberty, if she thinks fit, to discontinue the business, to have the property realized and turned into money, to invest it, and to enjoy the benefit of it. That is a general expression of the testator's intention. In expressing that intention he speaks of his interest in the partnership. He says that he is interested to the extent of one-third share in the partnership business carried on by himself and by his two brothers. They were entitled "*per mie et per tout*." This is a peculiar kind of interest, which does not exist in any other description of property. Where there are partners entitled to equal shares, if one of them dies the survivors are, according to law, entitled to his share. It may be that the partnership deed contains provisions which regulate that succession, but, unless there are special provisions to the contrary, the shares of surviving partners are augmented in consequence of the death of a partner. In this case the testator, having one-third share at the time when he made his will in 1857, by a series of accidents which I need not describe became entitled to the entirety. One of the results is that by the purchase of the other shares the testator's share has become increased. The accretion has taken place, but the share was never altered. It is impossible to make any distinction as to any particular part of this partnership property, and to say that that particular part belongs to the testator, and the rest to somebody else; because it was all his as much as any other part of his estate. Then, inasmuch as he has said, "I, being a manufacturer and in partnership, give all my interest in the partnership to my wife, including one-third of the capital, one-third of the profits, one-third of the buildings

and stock-in-trade, and so on," enumerating them particularly, because he afterwards becomes possessed of a larger interest than that one-third, it is said that the interest which passed by his will is confined to that one-third which he had in the year 1857, and is not to comprehend the interest which he had in 1881 when he died. In my opinion that would be a very violent construction. It is clear that it would disappoint the intention of the testator; but that does not dispose of the case, because if he has failed to express himself in words which will give effect to his intentions, the Court will not inquire into those intentions. But when you find the scope of a man's will to be, "I, being a manufacturer, in partnership, give to my wife the enjoyment of all the share in the business I am carrying on to which I may be entitled at my death," it cannot be, because that property has become increased by his own purchases or by the death of his brothers, that the provision he has made is to be confined to the one-third of which he was possessed at the date of his will. That would be a very violent construction, and one which I think the Court is not compelled to adopt.

Now *Struthers v. Struthers* (1), a case decided by a very eminent Judge, who never spared pains or due consideration to anything which came before him, seems to me to apply in principle, although it is not at all similar in facts, to the case before me. A man having a leasehold interest in certain houses which he described in his will, gave it to his trustee to hold in trust, for all the residue of the term for which the same should be held by him at the time of his death. He afterwards acquired the fee; and Vice-Chancellor *Kindersley* held that, under the terms of the will, the fee passed.

The case of *Backwell v. Child* (2), referred to in Mr. Justice *Lindley's* book, goes a little further, because it deals with partnership, and that, being a decision of one of the most eminent Judges who has ever administered the law in Courts of Equity, seems to go close to the matter. The case there was this. A testator, having a limited interest in a partnership, disposed of it by his will. The accidents which are incident to all partnership transactions occurred in that case. The shares were altered; the

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(1) 5 W. R. 809.

(2) Amb. 260.

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partnership was carried on for some time without articles, and then new articles were entered into by which the shares were altered, but the decision was, that the bequest took effect in the terms in which the testator had expressed it, and that the accidental change which had taken place did not in the slightest degree affect the interest which the testator intended to give, because the body and the substance which he had intended to give were clearly comprised in the disposition of the will. It appears from the report that Lord *Hardwicke* took time to consider, and it is worth while, inasmuch as the present case is one of extreme nicety, to look closely at this case of *Backwell v. Child* (1). [His Lordship read Lord *Hardwicke's* judgment in *Backwell v. Child*, and continued :—]

If I apply that to the case before me, the “body” here is subsisting, and no act done by the testator has ever deprived him of that third share of the partnership which he had when he made his will. It has been increased in the manner I have already alluded to, but his intention as expressed in his will has never undergone any change. During the number of years which elapsed between the date of the will and the date of his death he never altered his will in any way, he made no codicil to it, nor did he do any act of any kind to shew that the substantive thing which he had given by the will should not pass by the will in the terms in which he had expressed it. It is a long verbose will, containing provisions for the carrying on of the business, and for putting an end to the business, which are immaterial for the present purpose. The question before me is simply this, Did the testator, by acquiring two other shares in the partnership business, revoke in any manner, or vary in any manner, the disposition he had previously made? In my opinion the 23rd section of the *Wills Act* has a direct application, and I hold that the acquisition of a larger interest does not affect in the slightest degree the disposition which the testator made of all the interest he had in the houses, chattels, and other property in the co-partnership business, although the partnership had ceased to exist, and he had become the sole owner of the property.

Now I have said that this case is one of difficulty. No doubt

(1) Amb. 260.



it is. None of the cases referred to have any direct application, although I read the principle on which I decide this case clearly in the case of *Struthers v. Struthers* (1), and in the other cases mentioned, in which the authority of that case is recognised, and in no degree disputed. I think, moreover, it is greatly aided by the case from *Ambler*, in which Lord *Hardwicke* says, "If the body be subsisting at the death of the testator, the legacy shall be paid out of it." There is no question about the thing subsisting here, and if the thing is subsisting, the bequest contained in the will must have effect. I cannot doubt that by deciding as I do I am carrying into effect the intention expressed by the testator—not any intention gathered outside the will, but the intention expressed in the will itself.

There will be an answer to the effect that the Plaintiff is entitled for life to the whole of the profits of the business belonging to the testator at his death; and the costs will be costs in the action, unless the parties otherwise agree.

Solicitors for Plaintiff and the non-opposing Defendants: *J. & W. Maude*, agents for *Borlase & Yearsley, Mitcheldean*.

Solicitors for the other Defendants: *Thomas Fortune*, agent for *Minett & Piddocke, Ross*.

(1) 5 W. R. 809.

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Nov. 12, 19.

STURGE AND THE GREAT WESTERN RAILWAY  
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[1881 S. 1573.]

*Will—Tenants for Life—Next of Kin “by virtue of the Statutes” of Distribution  
—Time of ascertaining Class—Artificial Class.*

Where a testator gives property in trust for the benefit of the persons who at a time subsequent to his own death shall by virtue of the *Statutes of Distribution* be his next of kin, the class is an artificial class to be ascertained on the hypothesis that the testator lives up to and dies at the subsequent period of time.

**ADJOURNED SUMMONS** under sect. 9 of the *Vendor and Purchaser Act, 1874*.

*Young Sturge*, the testator in an action of *Sturge v. Sturge* [1880. S. 0943], by his will, dated the 23rd of April, 1842, devised his freehold lands in the parish of *Henbury, Gloucestershire*, unto and to the use of trustees, their heirs, and assigns, upon trust for the benefit of his daughter, *Frances Sturge*, and her appointees and issue, as after mentioned, and, after devising other hereditaments and declaring trusts concerning the various properties in favour of his children for their respective lives, the testator proceeded as follows:—“And from and after the decease of each respective child of mine then as to as well the trust property hereby given in trust for such child for life as the rents and annual proceeds thereof, in trust for all or any one or more of the children, grandchildren, or other issue of such child (such children, grandchildren, or other issue to be born in the lifetime of such child of mine) for such interest and in such proportions, if more than one, and subject to such conditions and limitations over in favour of any other or others of such children, grandchildren, or other issue as such respective child of mine, and as to my daughters, whether covert or sole, shall at any time or times” by deed or will appoint, and in default of such appointment, “then as to the property so held in trust for such child for life, and the rents and annual produce thereof, after the decease of such respective child, in trust for all and every the child and

children of such respective child of mine who shall attain the age of twenty-one years or marry, if more than one in equal shares as tenants in common, for the absolute use and benefit of such child or children respectively, and if there shall be no child of such child of mine who shall live to acquire a vested interest in such property under the trust lastly hereinbefore contained, in trust for all or any one or more of my other children, grandchildren, or other issue then living, for such interest and in such proportions and subject to such conditions and generally in such manner and form in all respects as such respective child of mine so dying without leaving any child who shall acquire a vested interest as aforesaid, and as to my daughters, whether covert or sole, shall at any time or times, by the means aforesaid, appoint, and in default of such appointment, then as to the property so held in trust for such child so dying, and the rents and annual proceeds thereof from the time of the decease of each respective child of mine, upon trust for the person or persons who at the time of such respective decease of my children shall by virtue of the statutes for the distribution of the estates of persons dying intestate be my next of kin, and if more than one, then in the shares, proportions, and manner prescribed by the said statutes, and that whether such property shall consist partly or wholly of freehold estate or not, the freehold estate being for the purposes of these trusts to be considered and to go as personal estate."

The testator died in 1844, leaving seven children, and no issue of any deceased child.

*Frances Sturge* died on the 14th of May, 1871, a spinster, and without having exercised the power of appointment given to her by the testator's will.

*Mary Harwood*, another daughter, survived the testator and died in the lifetime of *Frances Sturge*, leaving seven children who were living at the death of *Frances Sturge*.

The testator's statutory next of kin at his own death were his seven children: but the persons who at or immediately after the decease of *Frances Sturge* would have been entitled under the statutes if he had then died were his five surviving children, and the seven children of *Mary Harwood*.

Part of the land situate in the parish of *Henbury* was required

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V.-C. H. by the *Great Western Railway Company*, and the usual notice to treat for the purchase thereof was served by the company.

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The action of *Sturge v. Sturge* was instituted for a sale in lieu of a partition of the residue of the land, and by the judgment therein, dated the 17th of July, 1880, it was declared that according to the true construction of the will, the hereditaments had devolved upon the five surviving children of the testator and the seven children of *Mary Harwood*, deceased.

On the 30th of December, 1880, the trustees of the will contracted with the *Great Western Railway Company* for the sale to them of the land described in their notice to treat. The trustees had no power of sale, and it was proposed to make a title by the concurrence of all the beneficiaries. The company raised the question whether the children of *Mary Harwood* took any interest in the land, and thereupon the trustees—the vendors—took out a summons, as above mentioned, and it now came on to be heard.

*Dunning*, for the vendors:—

The question now raised was decided on the hearing of the action, *Sturge v. Sturge*, but the company are not satisfied with the declaration which was made. The case is governed by *Long v. Blackall* (1) and *Wharton v. Barker* (2), and not by the decisions in *Bullock v. Downes* (3) and *Mortimore v. Mortimore* (4). It is a case in the first class indicated by Lord Justice *Thesiger* in *Mortimer v. Slater* (5), except that here there is not the ambiguous word “then.” The class to take are clearly the statutory next of kin at the death of *Frances*. The company contend that under the gift to the next of kin at the death of a child (*Frances*) no one can take who was not one of the testator’s next of kin at his death: that *Mary Harwood*, having survived him, was one of his next of kin, and that her children were not; that the children did not at his death, or at any subsequent time, satisfy the description of his “next of kin by virtue of the statutes”; that the gift is to such of the next of kin at his death as continued to answer the description at the death of *Frances*. If that be so,

(1) 3 Ves. 486.

(2) 4 K. & J. 483.

(3) 9 H. L. C. 1.

(4) 4 App. Cas. 448.

(5) 7 Ch. D. 322–329.



there will be an intestacy in respect of *Mary's* share; for the surviving members of the class are not to take the whole, but their statutory shares only. In most of these cases the question has been whether the gift was to the next of kin at the testator's death, or to his next of kin at a later period. When, however, it is considered that the gift is to the next of kin at a period subsequent to his death, the persons to take, according to the decisions, are ascertained by finding who would have answered the description of his statutory next of kin if he had lived until that period. It is a gift to a class, on the hypothesis that the testator dies at a period subsequent to the actual date of death; and who answers the description of next of kin according to the statutes? The class cannot be ascertained until the period arrives, and then it is done on the assumption that the testator lived to it. Here the clause in the will is not limited to the death of any one of his children, but it applies to every one who dies without leaving a child to take, and without having made any appointment: there were as many possible periods of distribution as there were children. The testator created not one only, but seven hypothetical classes. If, however, it was nothing more than a gift "to the persons who at the death of my daughter *Frances* shall be my statutory next of kin," the persons to take would, it is submitted, be those who at her death would be the testator's statutory next of kin if he had survived her and died immediately afterwards. Who were meant by "my next of kin at the death of *Frances*"? Are they an artificial class to be determined on the hypothesis mentioned? or do the words denote such of "my next of kin as shall be living at the death of *Frances*." There is no substantial distinction between "next of kin by virtue of" and "according to the statutes."

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*Hastings*, Q.C., and *O. A. Saunders*, for the Railway Company :—

It is submitted that the testator has pointed out the time at which the persons to take are to be ascertained, and the mode in which they are to be ascertained. Those who answer the description are his five children who survived him. The children of *Mary Harwood* were not his statutory next of kin at his death.

There is no indication in the will of any intention to create an

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artificial class. The testator has not said, "as if I had died at the time of the death of *Frances*." Although the class was not to be ascertained before the death of the tenant for life, there are two qualifications necessary to constitute a member of the class:—Statutory kinship at the death of the testator, and existence at the death of the tenant for life. The case is governed by the decisions in *Bullock v. Downes* (1) and *Mortimer v. Slater* (2).

Those and those only can take who take "by virtue of the statutes," and by virtue of the statutes none can take who were not of kin to the testator at his death.

[They also referred to *Hervey-Bathurst v. Stanley* (3).]

HALL, V.C.:—

I cannot come to any other conclusion upon the construction of this will than that the testator has created an artificial class. It has been said in other cases of the same kind, and it is involved in the argument which has been addressed to me, that the testator has in effect said (though he has gone a most round-about way in doing it), "I leave the disposition of my property to the law. I do not make any disposition of it at all beyond a certain point; I leave it to go to those to whom the law will give it." That argument is one which, notwithstanding that it has not prevailed in many cases, is not without its weight, and it is worthy of consideration.

Nor is the circumstance without weight, that the testator has pointed, as it is not disputed that he has done, to several periods of time at which the classes of persons who are to take shall be ascertained, *i.e.*, "at the time of such respective decease of my children." With regard to this, it was contended that though you would have different times, and would also have, in a sense, different classes to take, because the classes are to take at the different times specified, yet they must consist of persons who are to take under the statute; and it might well be that when the time arrived for taking, some of the persons who had been ascertained to come in under the statute as next of kin, at the testator's death were no longer living, and therefore could not take. Thus they would be cut off from participating.

(1) 9 H. L. C. 1.

(2) 7 Ch. D. 322.

(3) 4 Ch. D. 251.

It has been said that the effect of the gift is to direct that those persons shall take who shall be entitled under the statute, excluding, however, any member of the class who may have died before the time specified for distribution, and that those who are so to participate will not take exactly according to the statute, but in certain relative proportions to be ascertained by reference to the statutes. It is a very refined argument, so to put a qualified construction upon the words "in the shares, proportion, and manner prescribed by the statute." It must be either one thing or the other. The persons designated are to take under and according to the statute, in the shares and proportions thereby prescribed, *i.e.*, they are to take either the whole of the share or no part of it. That is plain, as it seems to me, if the construction contended for be given to the language of the testator. But as I have said in the course of the argument, the interpretation of the meaning of testators in all these cases must depend upon a fair consideration of the language used.

With regard to the authorities which have been referred to, *Bullock v. Downes* (1), *Mortimer v. Slater* (2), and more particularly with regard to Lord Justice *James's* judgment in *Mortimer v. Slater*, I have to observe that the decisions depended upon the particular expressions used with respect to "such persons as will then be entitled." That is what Lord Justice *James* laid hold of at once in the latter case; and he asked in effect, "How do you shew that you are entitled under the description?" In order to satisfy the description you must be a person who can shew a title under the statute, and the only persons who can do that are the next of kin of the testator at his death; and he rested the case upon no other ground than that. In that case a reference was made to the judgment of Lord *Hatherley*, when Vice-Chancellor, in the case of *Wharton v. Barker* (3), and Lord Justice *Baggallay*, who, after stating what circumstances would not prevent the Court from holding that the time at which the class was to be ascertained was the time of the testator's death, said (4): "The Vice-Chancellor then went into the consideration of the particular words which he found in that case, and was of opinion that they did

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(1) 9 H. L. C. 1.  
(2) 7 Ch. D. 322.

(3) 4 K. & J. 483.  
(4) 7 Ch. D. 329.

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clearly and distinctly point to another period as the period at which the class was to be ascertained." And Lord Justice *Thesiger*, after stating that there were three classes of cases, said : "The first of these classes is the one where the word ' then,' the adverb of time, is attached to the description of the class, and in that case, as in *Wharton v. Barker* (1) and *Long v. Blackall* (2), it was decided that the word ' then' imported that the class was to be ascertained at the time so pointed out, *i.e.*, at the period of distribution." It appears to me that the corresponding words here, " who at the time of such respective decease of my children shall," &c., import that the class was to be ascertained at that time. It seems to me to follow as a matter of course that we have got an artificial class, artificial in the sense that you must suppose that the testator was looking to a class who would be ascertained at the time he designated and at no other time; and that although we find in this case a reference to the " shares, proportions, and manner prescribed by the statutes," yet those words must give way for the purpose of ascertaining the class at another point of time than that of the death of the testator, at which the statute would ascertain them.

We cannot ascertain the class at one point of time, *viz.*, the death of the tenant for life, and then turn to the statute and see whether all the members of the class ascertained correspond with the persons who would have taken under the statute if the point of time had been fixed at the death of the testator, and then adjust the shares and proportions. That would be a very unreasonable construction to put upon the will. Looking at the whole of the will, I cannot divest my mind of the impression that the true construction of it is that the testator intended, and in effect said, "at each of several periods you shall ascertain the class, and then the members of it are to take in certain modes, but the modes in which they are to take must be regulated by the Statutes of Distribution as nearly as the existing circumstances of the case will admit—the class being different from that which would have comprised the persons to take if it had been directed by me to be taken at a different period, *viz.*, at my death."

(1) 4 K. &amp; J. 483.

*45.572*

(2) 3 Ves. 486.



My opinion is, that the vendor's construction of the will is the right one. The class is to be ascertained at a time posterior to the testator's death. It is an artificial class in this sense: that we must suppose the testator had then died, *i.e.*, at the later date. Ascertain the class at that time and on that supposition, and the persons so ascertained will take in the shares and manner prescribed by the statutes.

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Solicitors: *Merediths, Roberts, & Mills*, agents for *F. Sturge, Bristol*; *R. R. Nelson*.

T. F. M.

### DE PEREDA v. DE MANCHA.

[1878 D. 161.]

*Practice — Infant—Ward of Court—Administration Action, Payment into Court—Summons for Appointment of Guardian.*

V.-C. H.  
1881  
Nov. 25.

In an administration action to which an infant was not a party, moneys were paid in to her separate account:—

*Held*, that this was sufficient to constitute the infant a ward of Court.

A summons for the appointment of a guardian to the infant was taken out before the action, and upon the hearing of the summons no order was made, but, upon the suggestion of the Judge, an arrangement was made as to access to the infant.

*Semble*, this was of itself sufficient to constitute the infant a ward of Court.

## PETITION.

*Vincente Maria de Pereda*, by his will, dated in September, 1877, after making certain specific and pecuniary bequests, gave to trustees the sum of £8400 consols upon trust to pay the dividends thereof to his wife, *Sarah de Pereda*, during her life or so long as she should continue his widow; and he requested her to apply part of the said dividends for or towards the maintenance and education or otherwise for the benefit of *Maria Vicenta de Pereda*, therein described as their adopted child and then between thirteen and fourteen years of age and living with them; and from and at the decease or second marriage of his said wife upon trust to apply the said dividends or such part thereof as the

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trustees thought proper (accumulating the unapplied portion) for or towards the maintenance and education of the said *Maria Vicenta de Pereda* until she should have attained the age of twenty-one years, and so soon as she should have attained that age upon trust to transfer to her the accumulations (if any), and to pay to her the dividends during her life for her separate use without power of anticipation; and after her death the testator directed the said sum, accumulations (if any), and dividends to be held in trust for other persons. And the said testator also bequeathed to his said trustees £1000 Brazilian Bonds of 1858, £1000 Brazilian Bonds of 1875, and £20,000 £3 per Cent. Spanish Bonds, upon trust to apply the whole or such part as they thought proper (accumulating the unapplied portion) for the benefit of the said *Maria Vicenta de Pereda* until she should attain twenty-one, and so soon as she should attain that age upon trust for her absolutely, but if she should die under that age, then upon trust for other persons.

The testator died in February, 1878, and on the 10th of July, 1878, an action was instituted for the administration of his estate, in which *Sarah de Pereda*, his widow, was Plaintiff, and the trustees and executors of his will Defendants.

The infant *Maria Vicenta de Pereda* in the will mentioned was the natural daughter of the testator by *Susan Pitt*, and was born in June, 1864.

On the 29th of June, 1878, just before the institution of the administration action, an application by summons, intituled in the matter of *Maria Vicenta de Pereda*, an infant, was made to the Vice-Chancellor in Chambers by *Susan Pitt*, that she might be appointed guardian of the person and estate of the infant.

Upon the hearing of this summons, which took place on the 10th of July, 1878 (the day on which the writ in the action was issued), no order was made; but at the suggestion of the Vice-Chancellor an arrangement was come to between the parties that *Susan Pitt* should be allowed reasonable access to her infant daughter.

The infant was not a party to the administration action, nor was she ever served with notice of the judgment or of any of the proceedings in the action; but, pursuant to an order made in it

on the 23rd of May, 1881, the executors and trustees of the will paid £99 15s. 3d. into Court to the credit of the action to an account intituled "Accumulated income of the trust premises bequeathed in trust for *M. V. de Pereda*, an infant;" and transferred £8400 consols into Court to the credit of the action, to an account intituled "The trust account of *Sarah de Pereda*, widow, and *M. V. de Pereda*, for their lives successively, with remainders over" (the dividends whereon had been ordered to be paid to *Sarah de Pereda* during her life or widowhood); and also deposited in Court to the credit of the action, to an account intituled "The contingent legacies by the testator's will bequeathed in trust for the said *M. V. de Pereda*, an infant," Brazilian Bonds amounting to the sum of £1500 and Spanish Bonds amounting to the sum of £20,017 10s., the dividends whereon had been ordered to be invested in consols.

On the 9th of June, 1881, the infant, who was then seventeen years of age, married without the knowledge of the Plaintiff or of the trustees, and without having obtained the leave of the Court.

The present petition was then presented, asking for an inquiry whether the marriage was a valid one, and that in case the marriage was valid, a proper settlement of the infant's fortune might be approved by the Judge and ordered to be executed by the husband and all other necessary parties. The petition was entitled in the action and "in the matter of *Maria Vicenta de Pereda*, an infant, by *Susan Pitt*, her next friend."

The Petitioner was the infant by *Susan Pitt*, her next friend, and the Respondents were her husband, the Plaintiff *Sarah de Pereda*, and the executors and trustees of the will.

The question argued was whether, under the circumstances, the infant was or was not a ward of Court.

*Hastings*, Q.C., and *Cass*, for the Petitioner:—

In the proceedings which took place upon the summons the Court exercised its jurisdiction over the person of the infant, and took her under its protection and control sufficiently to constitute her a ward of Court. If there is a suit in existence relating to the property of the infant, that is enough to give the Court

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jurisdiction: *Hughes v. Science* (1); *Butler v. Freeman* (2). A summons under the modern practice is equivalent to a suit, and an order for maintenance on petition or summons without suit constitutes an infant a ward of Court: *In re Graham* (3).

But, independently of the summons and what was done under it, the payment into Court in the administration action to the separate joint account of the infant and another person, and to the separate contingent account of the infant solely, was quite sufficient to constitute the infant a ward. It has been held that payment in under the *Trustee Relief Act* is enough: *In re Hodges' Settlement* (4); *In re Benand* (5); *In re Lloyd's Trusts* (6); *Re Hoare's Trusts* (7). And on what principle can it be said that payment in to a separate account in an administration action would not have the same effect?

*Kekewich*, Q.C., and *Hornell*, for the husband of the Petitioner:—

All that is laid down by the leading case of *Hughes v. Science* (8) is, that where an infant is made party, as plaintiff or defendant, to a suit dealing with his property, he is thereby constituted a ward of Court, and we do not dispute this. But in this case there is nothing whatever to have that effect. No order whatever was drawn up on the summons: the proceedings were abortive. The mere taking out of a guardianship summons is not enough, and there was nothing more except a suggestion by the Court. In *In re Graham* there was an actual maintenance order. Again the proceedings in the administration action took place entirely behind the back of the infant. Mere payment in under the *Trustee Act* without order made has never been held to be enough; and the *dicta* relied upon are not borne out by any decision. In *In re Birchell* (9) it was held that the appointment of a guardian was not enough, and in *In re Hillary* (10) it was decided that payment in of a legacy under the *Legacy Duty Act* was not enough. Neither

(1) 2 Eq. C. Ab. 756, pl. 14; S. C.  
Macpherson on Infants, App. I.

(2) Amb. 301.

(3) Law Rep. 10 Eq. 520.

(4) 3 K. & J. 213.

(5) 16 W. R. 538.

(6) I. R. 2 Eq. 507.

(7) 4 Giff. 254.

(8) 2 Eq. C. Ab. 756.

(9) 3 Atk. 813.

(10) 2 Dr. & Sm. 461.



is the mere payment in to an infant's credit in an action to which he is not a party.

[They also referred to *In re Bloye's Trust* (1).]

*W. W. Cooper*, for the trustees.

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HALL, V.C. :—

The view taken by the Lord Chancellor in *In re Hodges' Settlement* (2) was, as appears from the report of that case (3), "that the effect of the *Trustee Relief Act* was to put the parties in the position pointed out in *In re Bloye's Trust*, and insisted on in the argument." I understand by that that it was considered that, inasmuch as the *Trustee Relief Act* is an Act for relieving trustees from the necessity of instituting an action for the administration of the trust, and for enabling them to bring the money into Court on filing an affidavit, when an affidavit is made under the Act and money is paid into Court (for of course, if no money is paid in the proceeding would be an abortive one), the trustees are in the same position as if they had instituted an action for the administration of the trust.

In the present case an action has been instituted for the administration of the trust, and there are funds in Court to the credit of the action, which were in effect carried either to the account of the infant only, or to the account of the infant and another person jointly. That being so, I cannot say that the infant is not to be treated as a party present and before the Court with regard to those sums. The Court then holds those sums on behalf of the infant and must administer them for her, and in that way it has administration over the infant's property. That in itself is sufficient to constitute the infant a ward of Court as regards that property. It is true that it has been a prevailing error amongst practitioners (if indeed it be an error) to suppose that payment into Court under the *Trustee Relief Act* is equivalent to a suit for all purposes. No doubt under the old practice the infant would have been a proper party to a suit in respect of the trusts, and also under the modern practice she might not have been an im-

(1) 1 Mac. & G. 488.

(2) 3 K. & J. 213.

(3) 3 K. & J. 219.

39m 45860  
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proper party. As regards the trusts which have to be administered in this suit, it seems to me that the objection that the infant must have a next friend to represent her, and that, instead of taking the proceedings which were taken with regard to the custody and guardianship of the infant, an action ought to have been brought in her name instead of the summons which was taken out, is far too technical; and that it would be trifling in these days to be following out and tracing out such fine distinctions as those which have been submitted. If necessary, I shall certainly make a precedent in this case. Having said what I have as to the payment into Court, the summons in reality becomes unimportant for the present purpose. But as regards the summons, it would be a very narrow view to say that what was done in this case was not something akin to or in the nature of a partial order made on the summons dealing with the question of guardianship and leaving the infant in substance in the care and custody of the widow, upon the understanding that the mother should have reasonable access to her; and that I think in itself gives jurisdiction to the Court and constitutes the infant a ward of Court. On both grounds, therefore, I hold that the infant is a ward of Court, and I shall accordingly direct an inquiry whether she has contracted a valid marriage and a reference to approve of a proper settlement.

Solicitors: *G. S. Hare; Philbrick; Saffery & Huntley.*

W. W. K.

*In re* CARTA PARA MINING COMPANY.

V.-C. H.

*Practice—Winding-up Petition—Subsequent Petition by same Petitioner for Liquidation of his own Affairs—Security for Costs.*

1881  
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 Dec. 6.

After the presentation and before the hearing of a winding-up petition, the petitioner filed a petition for the liquidation of his own affairs under the 125th and 126th sections of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71):—

Held, that he must give security for costs in the winding-up petition.

Malcolm v. Hodgkinson (1) and *Brocklebank v. King's Lynn Steamship Company* (2) followed.

IN the month of August, Mr. *W. R. Horncastle*, who claimed to be a shareholder and creditor of the *Carta Para Mining Company, Limited*, presented a petition to wind up the company, which petition was, on the 12th of October, ordered to stand over until the completion of an examination of witnesses before a special examiner appointed in the matter. On the 2nd of December Mr. *W. R. Horncastle* presented, under the 125th and 126th sections of the *Bankruptcy Act*, 1869, a petition in the ordinary form for the liquidation of his own affairs by arrangement.

A motion was now made on behalf of the company that the Petitioner, Mr. *W. R. Horncastle*, might be ordered within a limited time to give security for the costs of the company incurred and to be incurred by them in relation to his petition to wind up the company, and all proceedings thereunder, and that in the meantime all proceedings might be stayed, and that in default of his giving such security within the time limited his said petition might be dismissed with costs, including the costs of such proceedings and of that application.

Locock Webb, Q.C., and *Buckley*, for the company, in support of the motion:—

In his petition for liquidation, Mr. *Horncastle* alleges that he is unable to pay his debts, and that being so, he is of course equally unable to pay costs in the winding-up if called upon to do so. In *Malcolm v. Hodgkinson*, where a plaintiff suing as trustee for

(1) Law Rep. 8 Q. B. 209.

(2) 3 C. P. D. 365.

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another in an action of trover filed a similar petition for liquidation, and a receiver had been appointed, the plaintiff was ordered to give security for costs; and in *Brocklebank v. King's Lynn Steamship Company* (1), where a plaintiff had filed a petition for liquidation after a cause had been set down for trial, the only question was whether his security for costs was to be confined to future costs; and it was held that there was no distinction between future costs and costs already incurred, and an order was made against the plaintiff extending to costs already incurred.

[They also referred to *Harvey v. Jacob* (2).]

*Hastings*, Q.C., and *Beddall*, for the Petitioner:—

Neither poverty nor insolvency is a sufficient ground for requiring security for costs from a plaintiff or petitioner who is *sui juris* and within the jurisdiction: *Hind v. Whitmore* (3); *Sykes v. Sykes* (4); nor will security for costs be required from a plaintiff who sues as the assignee of a bankrupt although he is in insolvent circumstances. The cases of *Malcolm v. Hodgkinson* (5) and *Sykes v. Sykes* are not authorities laying down the broad proposition that an insolvent plaintiff or petitioner must always give security for costs. For in the first of these cases a receiver had been appointed, and the ground of the decision, as appears from the remarks of Mr. Justice *Blackburn*, was the vesting of the property of the debtor in the trustee who had been or would be appointed. Here there is no *constat* that any trustee will ever be appointed, resolution passed, or composition agreed to. In the second case the question whether or not security for costs should be given at all was not argued, but merely the question whether the security should extend to costs already incurred.

The true rule is, we submit, that laid down in *Hind v. Whitmore* and *Sykes v. Sykes*, and the Petitioner ought not to be called on to give any security for costs either past or future.

[They also referred to *Burke v. Hutchinson* (6); *Morgan's* Chancery Acts and Orders (7); and *Daniell's* Chan. Prac. (8).

(1) 3 C. P. D. 365.

(2) 1 B. & Ald. 159.

(3) 2 K. & J. 458.

(4) Law Rep. 4 C. P. 645.

(5) Law Rep. 8 Q. B. 209.

(6) 7 Ir. Eq. 508.

(7) 5th Ed. p. 605.

(8) Page 37.



HALL, V.C.:—

It appears to me that the practice in these cases must be taken to be settled by the cases of *Malcolm v. Hodgkinson* (1) and *Brocklebank v. King's Lynn Steamship Company* (2). If it is to be otherwise settled, that must be done by another Court. These two cases were decided in 1873 and 1878 respectively, and the cases which were relied on as establishing the general rule, that insolvency is no ground for requiring security for costs (a rule the former existence of which I do not dispute), were decided some time previously. The old rule was, as I consider, departed from, whether rightly or wrongly, in *Malcolm v. Hodgkinson* and *Brocklebank v. King's Lynn Steamship Company*. *Malcolm v. Hodgkinson* is a case in which the Court acted, there being nothing more than the presentation of a petition for liquidation by arrangement under the *Bankruptcy Act* and the appointment of a receiver. The observation of Lord *Blackburn* in that case, that "where an insolvent person is suing as trustee for another, it has long been the rule to require security for costs," has been especially criticised. I think the learned Judge was then speaking of the case of a person who, not having the right to sue himself, allows his name to be used for the benefit of another as trustee for that other. Therefore I do not think that that observation was open to the criticism to which it was subjected. Whether the decision was right it is not for me to determine, but I consider that the decision covers the present case. I may add, that the case was heard before three learned Judges, viz., *Blackburn*, *Lush*, and *Archibald*, JJ.

The question was again considered in *Brocklebank v. King's Lynn Steamship Company*, and it was there apparently treated as almost a matter of course that under the circumstances security should be given. The Master made an order for security to be given, but in respect of future costs only. That order was appealed from, and varied by *Field*, J., so as to make it extend to costs already incurred. Another appeal was then made and heard before *Denman* and *Lindley*, JJ., but no one appears to have thought there was any doubt as to the right to the security, for

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(1) Law Rep. 8 Q. B. 209.

(2) 3 C. P. D. 365.

V.-C. H. the only question argued was whether the security should be as well for past as for future costs.

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I do not think that I am at liberty to do otherwise than follow the practice adopted in these two cases. I shall therefore make an order to stay proceedings until security for costs be given, and I fix the amount at £50.

Solicitors: *Kimber; Beall.*

W. W. K.

V.-C. H.

STIGAND v. STIGAND.

1882

[1882 S. 240.]

Jan. 13.

*Practice—Writ for Service out of Jurisdiction—Leave to issue—Leave to serve—Rules of Court, 1875, Orders II., r. 4, and XI., rr. 1 and 3.*

Applications for leave to issue a writ for service out of the jurisdiction, and for leave to serve out of the jurisdiction the writ when issued, should be made in Chambers; and such applications may be made either simultaneously or separately.

Evidence is only requisite upon the application for leave to serve. If the applications are simultaneous, the affidavit in support of the application for leave to serve should be intitled in the matter of the intended action, if separate, in the action.

Statement of the practice.

*Young v. Brassey* (1) not followed.

THIS was an application in an intended action of the above title for leave to issue a writ for service out of the jurisdiction, and also for leave to serve the writ, when issued, out of the jurisdiction.

*Farwell*, in support of the application, referred to *Young v. Brassey* (1), and to the Rules of Court, 1875, Orders II., rule 4, and XI., rules 1 and 3.

HALL, V.C., after conferring with the Registrar in Court (Mr. Pemberton):—

Since my decision in *Young v. Brassey*, a form of procedure has

(1) 1 Ch. D. 277.

been adopted in Chambers which appears to work well. It is not now the practice to apply to the Judge in Court for orders of this kind, and I myself have an objection to making such orders in Court, as it involves ascertaining there whether the case is a proper one, which it is better to do in Chambers. The practice is, as I understand it, as follows :—The applications for leave to issue and for leave to serve are made in Chambers either separately or simultaneously. When they are made separately, a copy of the writ is, in the first instance, brought to the Chief Clerk of the Judge, with whose name it is to be marked, and a verbal statement is made to him of the nature of the action, whereupon, unless the case is one which requires to be brought under the personal consideration of the Judge, a course which is adopted in all but very plain cases, the Chief Clerk indorses on the copy of the writ the leave to issue it, and then the subsequent order giving leave to serve the writ thus issued is made upon affidavit intituled in the action. If the applications are made simultaneously the application for leave to serve is supported by affidavit intituled in the matter of the intended action.

This being so, notwithstanding my decision in *Young v. Brassey* (1), I must refuse the present application.

Solicitors : *Fladgate, Smith, & Co.*

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Jan. 18, 20,  
21, 23, 24.

## SEDDON v. BANK OF BOLTON.

[1880 S. 2851.]

*Easement—Light—Enjoyment—Interruption—Notice—Prescription Act (2 & 3 Will. 4, c. 71), s. 4—Evidence—Onus probandi.*

*Semble*, that the person who asserts that an alleged twenty years' enjoyment of light has been interrupted during that period is bound, under sect. 4 of the *Prescription Act*, to prove that some notice (other than that which arises from the mere existence of a physical obstruction) was given to the person interrupted of the person by whose authority the interruption was made.

A Plaintiff who alleges a twenty years' enjoyment of light must prove affirmatively a *primâ facie* case of enjoyment. But, when he has done this, the Defendant may displace the *primâ facie* case, either by proving the existence of an obstruction at the commencement of the twenty years, or a statutory interruption of the enjoyment at some time during the twenty years, or by shewing by other evidence that the Plaintiff's evidence of enjoyment cannot be relied upon. In either way the Defendant will discharge the *onus* which is cast on him.

THIS action was brought to restrain an alleged interference by the Defendants with the Plaintiff's ancient lights.

The writ was issued on the 25th of September, 1880. The Plaintiff, *John Seddon*, was the owner of a lease, for the residue of a term of 999 years from the 1st of May, 1837, of a house situate on the west side of *Market Street, Farnworth*. The south side of the house adjoined land belonging to the Defendants, and on that side of the house was a window which lighted a staircase. There was also, running along the south side of the house, and between it and the Defendants' land, a shed or lean-to which had been used as a shoemaker's workshop. This shed was lighted by two small windows, one at the east end, the other at the west end, and also by two skylights in its roof. The only question was as to the staircase window and the skylights.

By his statement of claim the Plaintiff alleged that the window and the skylights "are ancient lights which have existed in their present state for upwards of twenty years last past, and the access and use of light to each of the said windows have been actually enjoyed with the said dwelling-house for the full period of twenty years last past without interruption."



Shortly before the commencement of the action the Defendants erected a wooden hoarding, about sixteen feet high, on their land close to the shed, with the object of obstructing the access of light to the window and skylights, it being their intention to erect a building on their land in the same position and of the same height as the hoarding. By arrangement between the parties the Defendants removed the hoarding without prejudice to their rights, the Plaintiff undertaking to commence an action to try his right to restrain them from building so as to obstruct the window and skylights. This action was accordingly brought. The Plaintiff claimed an injunction to restrain the Defendants from building on their land in such a manner as to darken or injure the window or the skylights, or to obstruct the access of light thereto.

After the delivery of the statement of claim the Plaintiff died, and his widow, who was his administratrix, obtained the common order giving her liberty to carry on the action.

By their statement of defence the Defendants denied "that the access or use of light to each or any one of the said windows has been enjoyed with the dwelling-house for the full period of twenty years, or, if it has been so enjoyed, that it has been enjoyed without interruption. On the contrary, the Defendants, who are the owners in fee simple of the land adjoining the said dwelling-house on the south side thereof, say that their predecessors in title from time to time, both before and also during and within the twenty years immediately prior to the commencement of this action, erected and maintained on their land hoardings for the express purpose of interrupting and obstructing, and which did interrupt and obstruct the access of light to the said windows, and for the express purpose of preventing and which did prevent any right to light being acquired in respect of the said windows or any of them as against the said land or the owners thereof, and several of such hoardings, both before and after the commencement of the said period of twenty years, were respectively kept standing for more than a year at a time, and the interruptions of light to the said windows thereby caused were respectively submitted to and acquiesced in for more than one year after the owner and occupier for the time being of the said dwelling-house had notice thereof."

At the trial the Defendants adduced evidence to shew that

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during parts of the years 1859 and 1860 a hoarding had been erected by the then owner of the Defendants' land in front of the staircase window, and that a similar hoarding had been erected during parts of the years 1864 and 1865. The effect of the evidence is stated in the judgment of the Court.

*Cookson, Q.C., and Farwell, for the Plaintiff :—*

Our evidence shews that the Plaintiff and her predecessors in title have had an uninterrupted twenty years' enjoyment of the light prior to the commencement of the action, except the interruption by the Defendants, and that the buildings which they intend to erect will substantially interfere with her enjoyment.

*Glasse, Q.C., and W. Phipson Beale, for the Defendants :—*

We have proved an obstruction in 1860, such as to prevent the commencement of enjoyment twenty years before the issue of the writ, and, even if the twenty years did begin to run then, we have proved a sufficient interruption in the years 1864 and 1865.

[FRY, J. :—Sect. 4 of the *Prescription Act* (1) requires that the party interrupted should have had notice of the interruption, and of the person making or authorizing the same to be made ; must there not be a notice in writing ? You have not proved any such notice.]

The notice need not be in writing ; the existence of the physical obstruction is of itself sufficient notice.

(1) Sect. 3 provides that "When the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Sect. 4. "Each of the respective periods of years hereinbefore men-

tioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question ; and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to, or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made."

[FRY, J.:—It does not tell you by whose authority the obstruction is put up.]

It must be assumed that it was put up by the owner of the land, not by a trespasser. It is not like an obstruction to an alleged right of way. The person who claimed such a right might not want to exercise it for some time, and until he attempted to exercise it he might have no knowledge of the obstruction; but the existence of an obstruction to the access of light must, from the nature of the case, be known at once to the person whose light is darkened. That which a person of ordinary intelligence would infer from something which is done is a sufficient notice. The Court is entitled to draw an inference from all the facts whether notice was given.

But the *onus* of proving the twenty years' enjoyment is on the Plaintiff, and she has not discharged it. She starts with a date about which it is clear that there was an obstruction. The Act will be construed very strictly: *Lowe v. Carpenter* (1). The existence of a real substantial obstruction for a year during the twenty years has been shewn, and that is enough.

The Plaintiff was allowed to adduce evidence to rebut some of the Defendants' evidence.

*Cookson*, in reply:—

The injunction which we ask is in the form adopted in *Yates v. Jack* (2). There it was held that the owner of ancient lights is entitled to all the light which he had enjoyed previously to the interruption sought to be restrained. That means enjoyed as of right. The injunction will not interfere with any right which the Defendants have acquired or retained by reason of the erection of the hoardings. They may be entitled to build to the extent of the old hoardings, but they now propose to do something much more extensive.

The Defendants have failed to prove any limitation on the inception of the Plaintiff's enjoyment. The Plaintiff having proved a *prima facie* case of uninterrupted enjoyment for twenty years, the *onus* is then thrown on the Defendants, who allege a

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(1) 6 Ex. 825.

(2) Law Rep. 1 Ch. 295.

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particular limitation of it, to prove the existence and nature of the limitation. The *onus* of proof is on him who affirms, and, moreover, whether a man is affirming or denying, the burden of proof is always upon him within whose knowledge the fact peculiarly lies: *Ree v. Turner* (1); *Elkin v. Janson* (2); *Taylor* on Evidence (3).

[FRY, J.:—Suppose I cannot rely on the Plaintiff's evidence, because her recollection is evidently imperfect; can I hold that she has discharged the *onus probandi*? I think I am entitled to look at the Defendants' evidence on other matters than the particular issue, to see whether the Plaintiff's evidence can be relied on.]

On our evidence it is clear that the hoarding of 1860 had been taken down before the 25th of September, 1880.

As to sect. 4 of the *Prescription Act*, an interruption is of no effect unless it is acquiesced in. In order to prevent acquiescence it is not necessary to bring an action, a protest is enough: *Bennison v. Cartwright* (4); *Glover v. Coleman* (5). In order, however, that the protest may be made, the person to whom it is to be made must be known, and the mere physical existence of a hoarding affords no notice of the person by whose authority it is erected. And, in the present case, the existence of a hoarding in 1864 has not been sufficiently proved.

*Glasse*, in reply as to the rebutting evidence.

FRY, J.:—

The Plaintiff seeks an injunction in respect of alleged ancient lights.

The facts with regard to the position of the property are not in dispute. [His Lordship stated the facts and continued:—] With regard to the staircase window, the first question is this: Has the Plaintiff shewn an enjoyment of access of light to that window for twenty years prior to the commencement of the action on the 25th of September, 1880? The evidence of enjoyment of light

(1) 5 M. & S. 206.

(3) 7th Ed. vol. i. p. 344.

(2) 13 M. & W. 655.

(4) 5 B. & S. 1.

(5) Law Rep. 10 C. P. 108.



during that period is in the first place that of the Plaintiff herself, who speaks to her knowledge from the year 1848 down to the present time. According to her evidence the light has never been interfered with by any hoarding, except on one occasion, which she says was some two or three years before a certain *John Crompton* died in the year 1860, and she adds that there was no obstruction to the window in the year 1864. In the next place, *Edwin Wilkinson*, who has known the property from the year 1852 to the year 1863, and again from 1868, as I understand, down to the present time, says that he has no recollection of the existence of any hoarding interfering with the light to the window. *William Wilkinson* speaks to looking out of the window towards the end of October, 1860, and a surveyor of the name of *Scholes* says that he knew the property from the year 1852 to the year 1875, and that he never saw any hoarding there during that period. A witness for the Defendants of the name of *Boardman* thinks that the hoarding was there till about the spring of 1860. This evidence, to my mind, is highly unsatisfactory, and for this reason, that it has been shewn to my satisfaction by other witnesses that there was a hoarding erected against this window for the express purpose of obstructing the light during parts of the years 1859 and 1860 and during parts of the years 1864 and 1865, and it is evident, therefore, that these witnesses are persons who (I do not mean for one moment to suggest that they desire to state what is false), both from want of exactitude of observation and from want of memory, are unable to give any evidence on which I can rely with regard to the exact position of things at the commencement of the twenty years in question. Against that evidence there is evidence of this description: Dr. *Anderson*, who was the owner of the Defendants' property at the time, told me that he caused a hoarding to be erected about the beginning of June, 1859, and, according to his evidence, it was certainly left up till some few weeks (that was his expression) after the end of July, 1860, a date which comes very near indeed to the date in question. *William Astley* said at first that the hoarding of 1859 was up for eighteen months, but on cross-examination he did not adhere strictly to that statement, and he said it might have been twelve months, or it might have been more, or it might possibly

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have been less. *Mary Ann Astley*, his wife, spoke to a period of eighteen months, but she admitted that she spoke to that period from a statement made to her by her husband. Lastly, *Coope*, a builder, said that the hoarding was up in August, 1860, because at that time a Wesleyan chapel was opened, and some person who visited the town on that occasion called his attention to the hoarding, and asked what it was there for.

That is a summary of the evidence, and in that state of the evidence I have to ask myself upon whom does the burden rest of proving the enjoyment of the access of light for twenty years? The answer is plain—it rests on the Plaintiff. Has, then, the Plaintiff discharged that burden? I answer she has not, because there is no evidence tendered by her on which I can rely. It has been very strongly urged on her behalf that I am bound to accept her evidence, and the evidence of the other witnesses who confirm her as shifting the burden, and that thereupon it becomes the duty of the Defendants to shew at what period exactly the hoarding existed and to what date the commencement of the enjoyment is to be postponed. I do not take that view of the law. If, on the whole evidence, I come to the conclusion that the evidence tendered by the Plaintiff affirmatively is not such that I can place any reliance on it (and I cannot do so in this case), then it appears to me that the Plaintiff has failed in sustaining the burden which rested on her. In other words, the Defendants may, in my judgment, displace the whole effect of the affirmative evidence of the Plaintiff in either of two ways. They may either shew the existence of an obstruction at the commencement of the twenty years, or an interruption at some period afterwards, or they may shew—and in this case, in my judgment, they have shewn—that the evidence of twenty years' enjoyment tendered by the Plaintiff is evidence on which the Court cannot rely, because the Plaintiff's witnesses are contradicted by other witnesses on whom the Court does place reliance. In my judgment, therefore, the Plaintiff fails in regard to that contention.

The second question is, whether the hoarding, which was erected in 1864 and which continued till 1865, was an interruption of the Plaintiff's rights under the 4th section of the *Prescription Act*, supposing those rights existed. Taking the view which I have

already stated with regard to the first question, it is not necessary for me to determine the second question, and I will only observe that, in my judgment, the Defendants have not shewn that kind of notice to the person interrupted of the person authorizing the erection of the hoarding, which would make the hoarding of 1864 an interruption within sect. 4 of the statute.

The third question with regard to the window is whether there is any such material difference between the hoarding of 1859 and the building which the Defendants now propose to erect as to give the Plaintiff a right to an injunction, notwithstanding the hoarding of 1859; and on the evidence I have come to the conclusion that no practical or considerable difference will exist in the obscuration of the Plaintiff's light. The result is that the Plaintiff fails in respect of the staircase window.

I then come to the question of the two skylights in the shed, and it is admitted that the hoardings of 1859 and 1864, being placed at a considerable height above the shed, had really no effect on the access of light to the skylights. On the evidence I have come to the conclusion that the interference of the Defendants' new buildings with the access of light to the skylights will be considerable, and that the Plaintiff is entitled to an injunction in respect of them.

I therefore dismiss so much of the action as seeks relief in respect of the staircase window, and I direct the Plaintiff to pay to the Defendants the amount by which the costs have been increased by reason of that claim, and, in order to guide the Taxing Master, I will state that, in my opinion, two thirds at least of the time of the Court has been occupied in the discussion with regard to the staircase window. I grant an injunction in the usual terms in respect of the two skylights, and order that the remaining costs of the action be paid by the Defendants. There will be the usual set-off.

Solicitor for Plaintiff: *Thomas Grundy, agent for Grundy, Kershaw, & Co., Manchester.*

Solicitors for Defendants: *Clarke, Woodcock, & Ryland, agents for Holden & Holden, Bolton.*

W. L. C.

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Jan. 11, 27, 30.

*In re* HAYWARD.CREERY *v.* LINGWOOD.

[1878 H. 257.]

*Absolute Interest—Gift over on Death—Death between Date of Will and Death of Testator—Substitutional Gift.*

A testator bequeathed his residuary personalty to trustees in trust for the children of *L.*, to be divided equally between them, and directed that, "In case of the decease of either of them leaving a family, then such share as the parents would have taken shall be equally divided amongst the children of such deceased parents":—

*Held*, that "decease" meant decease during the testator's life—that the children of *L.* who survived the testator took absolutely—and that the children of one child of *L.*, who died between the date of the will and the death of the testator, took the share which this parent would have taken.

*EDWARD HAYWARD* (the testator in this action) made his will on the 5th of February, 1870, and, after referring to an allowance which had been made for his wife, and expressing a desire to increase it to a sum of £150 a year, he directed his trustees to invest a fund which would produce that sum, and directed that on the death of his wife "such sum so to be invested and the securities therefor and all accumulated income thereof not required for the trust declared in favour of his wife should become reunited with the remainder of his trust estate." Then, after giving certain pecuniary legacies, the testator continued as follows: "I direct my trustees to invest the residue of the money arising from the conversion of my property in any of the securities hereinbefore mentioned, and to hold such last-mentioned investments (and after the death of my wife the money and securities held to answer the provision for her) and all arrears and accumulation of interest and income on trust for the children of Mrs. *Edward Lingwood* to be divided equally between them as tenants in common whether male or female. In case of the decease of either of them leaving a family, then such share as the parents would have taken shall be equally divided amongst the children of such deceased parents."



The testator died on the 14th of June, 1877, and the Plaintiffs were the executors of the will.

At the time of the testator's death there were nine children of Mrs. *Edward Lingwood* living, and one, *Septimus Lingwood*, had died between the date of the will and the death of the testator leaving seven children, who survived the testator.

The questions to be determined were two: First, whether the nine children of Mrs. *Edward Lingwood* took absolutely or subject to gift over in the event of the death of any one of them leaving issue. Secondly, whether the children of *Septimus* took together with their uncles and aunts.

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*Stallard*, for the trustees.

*Fischer*, Q.C., and *De Castro*, for children of Mrs. *Lingwood*:—

The children of Mrs. *Lingwood* take absolute interests, not defeasible after the death of the testator: *Slade v. Milner* (1); *Cambridge v. Rous* (2).

*Methold* and *R. F. Norton*, in the same interest.

*Bevir*, Q.C., and *Brett*, for infant children of one of Mrs. *Lingwood's* children:—

The children of Mrs. *Lingwood* took interests defeasible in case of any dying leaving issue: *Farthing v. Allen* (3); *Cooper v. Cooper* (4); *Bowers v. Bowers* (5); *Edwards v. Edwards* (6); *Ingram v. Soutten* (7).

*Fischer*, in reply.

FRY, J., directed that the children of *Septimus Lingwood* who died between the date of the will and the death should be represented by counsel.

Jan. 19. *Eyre*, for the children of *Septimus Lingwood*:—

The children of *S. Lingwood* take the share which their parent

(1) 4 Madd. 144.

(2) 8 Ves. 12.

(3) 2 Madd. 310.

(4) 1 K. & J. 658.

(5) Law Rep. 5 Ch. 244.

(6) 15 Beav. 357.

(7) Law Rep. 7 H. L. 388.

FRY, J. would have taken; *In re Potter's Trusts* (1); *In re Hotchkiss's Trusts* (2); *Habergham v. Ridehalgh* (3); *In re Smith's Trusts* (4); *Smith v. Smith* (5).

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*Methold* referred to *Olivant v. Wright* (6), *Galland v. Leonard* (7), *Ware v. Watson* (8), to shew that the children of Mrs. *Lingwood* took indefeasible interests.

*Bevir*, in reply as to the substitutional gift to the children of *Septimus*, referred to *Ive v. King* (9); *Christopherson v. Naylor* (10); *Stewart v. Jones* (11).

FRY, J., stated the will and the question to be determined, and continued:—

There is, in my judgment, no doubt that, when a gift is made to a person in terms absolute, and that is followed by a gift over, in the event of the death of that person *sub modo* (that is to say, without issue or subject to any other limitation which makes the death a contingency), the effect of the gift over is *primâ facie* to prevent the first taker from taking absolutely, to convert the interest of the first taker into one subject to the contingent devise or bequest over. In such a case, there is no reason to confine the meaning of the word "death" to death during the lifetime of the testator or death during the life of the tenant for life. The only reason, or the main reason, why that is done in certain cases is, that the testator has spoken of death which is certain, as a contingency, but when the testator has spoken of death *sub modo*, that being contingent, there is no need to render it contingent by introducing any limitation.

Does this case come within that principle or does it not? In the first instance I thought that it did, and I felt myself fortified in that conclusion by the provision directing the investment of

(1) Law Rep. 8 Eq. 52.

(2) Ibid. 643.

(3) Ibid. 9 Eq. 395.

(4) 5 Ch. D. 497, n.

(5) 8 Sim. 353.

(6) 1 Ch. D. 346.

(7) 1 Sw. 161.

(8) 7 D. M. & G. 248.

(9) 16 Beav. 46.

(10) 1 Mer. 320.

(11) 3 De G. & J. 532. *5 June 1882*

his residue; but, on second thoughts, I think that the words of the gift over in this case are too clear to enable me to come to that conclusion. The words used by the testator are these: "In case of the decease of either of them leaving a family, then such share as the parents would have taken shall be equally divided amongst the children of such deceased parents." Those words, in my judgment, point to a gift to take effect in the event of the parents dying before the time of taking, that is to say, before the death of the testator.

Therefore it appears to me, that if any child of Mrs. *Lingwood*, who could have taken if he or she had been alive at the death of the testator, died leaving children, such children would be entitled to take the share which the parent would have taken.

I come, therefore, to the conclusion that, in the first place, the nine children take absolutely as surviving the testator, and, in the second place, that the children of *Septimus* are entitled to share with their uncles and aunts.

I have looked at the numerous authorities cited in the course of the argument. I am not sure that any one of them is sufficiently near to make it important to cite it now, and I believe that none of the authorities conflict with the decision I have arrived at.

Solicitors: *Duncan, Warren, & Gardner*; *G. L. P. Eyre & Co.*

C. W. C.

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## BARBER v. BLAIBERG.

[1880 B. 3600.]

*Counter-claim*—"Connected with the original Cause or Matter"—*Third Party*—*Judicature Act*, 1873, s. 24, sub-s. 3; *Rules of Court*, 1875, Order xvi, r. 17.

FRY, J.  
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Feb. 15

An action asking relief as in detinue was brought against a sole Defendant, who had seised goods which *B.* had assigned to the Plaintiff under a bill of sale.

The sole Defendant filed a statement of defence and a counter-claim impeaching the *bona fides* of the Plaintiff's bill of sale, and alleging a bill of sale by *B.* to himself, and by such counter-claim claimed, (1) relief against the Plaintiff, and (2) as against *B.* the money due under the bill of sale

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from *B.* to himself, and damages for the alleged fraud. The counter-claim against the Plaintiff was abandoned at the hearing:—

*Held*, that the relief asked by the Defendant against *B.* was not a matter sufficiently “relating to or connected with the original cause or matter” to be the subject of a claim under sect. 24 of the *Judicature Act*, 1873.

912740 THE action was commenced by *James Barber* against *Benjamin Blaiberg* as sole Defendant, and the statement of claim stated the due execution by *E. W. Bass* of a bill of sale to the Plaintiff *Barber*, and that the goods comprised in such bill of sale had been forcibly seized by *Blaiberg*, and claimed the return of the goods, and damages for their detention.

*Blaiberg* filed a statement of defence to the original action, and a counter-claim to which he made *Barber* and *Bass* Defendants.

By his statement of defence he impeached the *bona fides* of *Bass*'s bill of sale, and pleaded that *Bass* had executed a bill of sale to himself for £100 of property including that comprised in the first bill of sale to the Plaintiff without declaring that there had been any previous bill of sale, and charged both *Barber* and *Bass* with fraud in connection with the two bills of sale. And by way of counter-claim *Blaiberg* repeated the statements made in his statement of defence, and claimed:—

1. As against both *Barber* and *Bass*, a declaration that he was entitled to the goods and chattels comprised in the bill of sale to him.

2. An injunction to restrain *Barber* and *Bass* from parting with such goods and chattels.

3. That they might be ordered jointly and severally to pay to *Blaiberg* the residue of the debt to him after deducting the value of such goods and chattels.

4. In the alternative, as against the Defendant *Bass* alone, that the Defendant *Bass* might be ordered to pay to *Blaiberg* £91 13s. 4d. (the amount still due under the bill of sale to him), with interest at £5 per cent. and the costs of the action.

5. In any case, that *Bass* might be ordered to pay to *Blaiberg* all costs, charges, and expenses of and incidental to the seizure by him of the said goods and chattels, together with damages for the fraud and misrepresentation thereinbefore stated.

6. Accounts, inquiries, and further and incidental relief as might be required.



*Bass* replied to the counter-claim and asserted the *bona fides* of the bill of sale to *Barber*, and denied the validity of that to *Blaiberg*, alleging that, even if it was duly executed, it was obtained from him by fraud.

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*Gaskell* and *Carson*, for the Plaintiff *Barber*.

*Popham*, for *Bass*.

*Cookson*, Q.C., and *Seward Brice*, for *Blaiberg*.

In the course of the hearing of the original action,

*Cookson*, Q.C., and *Seward Brice* abandoned all questions of fraud against *Bass*.

On the counter-claim,

*Cookson*, Q.C., and *Seward Brice* declined to open any case against *Barber* on the three first paragraphs of the counter-claim; but were proceeding to argue upon the 4th paragraph, that *Bass* was liable to pay the money still due on the alleged mortgage.

*Popham*, for *Bass*:—

The counter-claim against *Bass* alone is informal and must be dismissed.

By the *Judicature Act*, 1873, s. 24, sub-s. 3, the Court may grant to a defendant all such relief against any plaintiff as such defendant shall have properly claimed by his pleading and as against a third party relief “relating to or connected with the original cause or matter,” which this is not.

Order XVI., rule 17, only provides that an action may be tried in the presence of a third party under certain circumstances, but makes no provision for granting any relief against such third party: *Harris v. Gamble* (1); *Warner v. Twining* (2); *Crowe v. Barnicot* (3).

*Cookson*, Q.C., and *Seward Brice*, in support of the counter-claim:—

This objection was waived by *Bass* when he put in a reply to the counter-claim.

(1) 6 Ch. D. 748.

(2) 24 W. R. 536.

(3) 6 Ch. D. 753.

FRY, J. The counter-claim is put in under Order XVI., r. 17; Order XIX.,  
 1882 r. 3; Order XXII., r. 10; *Shephard v. Beane* (1); *Furness v.*  
 BARBER *Booth* (2).

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FRY, J.:—

The Plaintiff *Barber* was grantee under a bill of sale executed by *Bass* on the 28th of April, 1880, and duly registered on the 3rd of May, 1880. On the 1st of June, 1880, *Bass* executed the subsequent bill of sale to *Blaiberg*. In October, 1880, *Blaiberg*, or his agents, removed from *Bass's* premises certain wine, goods, and chattels comprised in *Barber's* bill of sale. Thereupon *Barber* brought this action for detinue or damages. Then *Blaiberg* put in a statement of defence, and what is called a counter-claim, and he made *Bass* a party, and asked, against *Barber* and *Bass*, for a declaration that he was entitled to full relief under the bill of sale to him, and in the alternative he asked, as against *Bass* alone, that *Bass* might be ordered to pay to *Blaiberg* the amount still due under his bill of sale with interest and costs. This counter-claim has not been opened on any point except the liability of *Bass* to pay this amount said to be due on the bill of sale.

The counter-claim against *Bass* appears to me to be no better for being joined with the other claims which have been abandoned, than it would have been if it stood alone.

The question is whether such relief as is asked against *Bass* can be properly claimed by counter-claim in this action. The counter-claim is based on the 24th section of the *Judicature Act*, 1873, sub-s. 3, which provides that the Courts shall have power to grant to any Defendant in respect of any matter of equity, and also in respect of any legal right claimed by him, certain relief against any plaintiff claimed by the defendants pleading, and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of any such claim pursuant to any rule of Court or any order of the Court as might properly have been granted against such person

(1) 2 Ch. D. 223.

(2) 4 Ch. D. 586.

if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose.

The question, therefore, is whether the payment asked by *Blaiberg* from *Bass* is a matter "relating to or connected with the original cause or matter." The original subject of this cause is *Barber's* right to have the goods which *Blaiberg* has seized. The two matters are, in my judgment, totally distinct, and ought to be the subject of distinct litigation. Therefore I think the objection taken to this part of the counter-claim is valid, and the other portion of the counter-claim having been abandoned, I dismiss the counter-claim with costs.

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Solicitor for Plaintiff: *O. Vernède.*

Solicitors for Defendants: *John Hopkins ; Moresby-White & Co.*

C. W. C.

KAY, J.

1881

Dec. 7, 8.  
15, 20.YORKSHIRE RAILWAY WAGON COMPANY *v.*  
MACLURE.

[1879 Y. 26.]

*Railway Company—Borrowing—Fictitious Sale—Ultra Vires—Security on  
Rolling Stock—Guarantee.*

21 Ch D 135  
8 A p p c s 309

A railway company being in want of money, and being advised that they had no power to borrow, sold part of their rolling stock to a wagon company for £30,000, at the same time making a contract with the wagon company for the hire of this rolling stock at a rent which would repay the £30,000 and interest in five years. At the same time three of the directors of the railway company guaranteed to the wagon company the payment of the rent.

The wagon company brought an action against the sureties and the railway company for rent due:—

*Held*, that on the evidence the alleged sale and hiring was in fact a borrowing of £30,000 on the security of the rolling stock; that this was an illegal and void transaction under 7 & 8 Vict. c. 85, s. 19, and 30 & 31 Vict. c. 127, s. 4; and that this defence was available both in law and in equity:

*Held*, nevertheless, that the guarantee was valid, and that the sureties were liable under it.

*Ex parte Williamson* (1) observed upon.

21 Ch D 309 C A  
THE Cornwall Minerals Railway Company were in want of money, and their borrowing powers under their Act were nearly exhausted. In the month of June, 1876, negotiations took place between them and the Yorkshire Railway Wagon Company for an advance of £30,000 to the Railway Company. The Railway Company were advised that they could not give a valid security for the proposed advance as a loan, but that the agreements next mentioned were within their powers. Accordingly an agreement under seal was made between the companies, dated the 20th of June, 1876, by which it was agreed that the Wagon Company should let, and the Railway Company should hire, for the term of five years, fifteen locomotive engines (therein stated to belong to the Wagon Company, and to bear their name-plates), at the yearly rent of £4,428. The Railway Company was bound to keep the engines in repair, and if default was made in any of the pay-



ments the *Wagon Company* might seize and take away the engines: on the due completion of the agreement the *Railway Company* were to have the option of purchasing the engines at £1 each. On the same 20th day of June, 1876, three of the directors of the *Railway Company*—*John W. Maclure, J. Nield,* and *A. O. Sherriff*—signed a guarantee as follows, appended to the agreement:—

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“To the *Yorkshire Railway Wagon Company, Limited*. — In consideration of your letting the above-mentioned engines to the *Cornwall Minerals Railway Company*, on the terms above-mentioned, at our request, we, the undersigned, hereby jointly and severally guarantee the due payment to you by the said *Cornwall Minerals Railway Company* of all rent payable by them in pursuance of the above written agreement up to and including that payable on the 1st day of January, 1879. And we also jointly and severally guarantee the observance and performance by the said *Cornwall Minerals Railway Company* up to the said 1st day of January, 1879, of all the stipulations on their part contained in the above-written agreement.”

A similar agreement and a similar guarantee were made as to 200 railway waggons, the rent for them being £2952. The engines and waggons had been part of the rolling stock of the *Railway Company* and it was alleged and not denied that a formal delivery of them to the *Wagon Company* had been made, but no bill of sale had been executed, and they continued to be used by the *Railway Company*. It was admitted at the bar that the £30,000 had been received and had been applied by the *Railway Company* in payment of debts owing by them.

In 1879 the *Wagon Company* brought an action against *John W. Maclure*, one of the directors who signed the guarantee, and the executor of *A. O. Sherriff* (the third, *J. Nield*, being dead insolvent), and by amendment against the *Railway Company* alleging, as appeared to be the fact, that the rents for the engines and waggons had not been paid, and that the *Railway Company* had sold them to the *Great Western Railway Company*; and claiming damages for breach of the guarantees, and payment of the rent and interest thereon.

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*Maclure*, by his statement of defence, pleaded that the sale of the engines and waggons was nominal, and made in order to disguise the fact that the transaction was a loan; that the borrowing the money was *ultra vires* and illegal, and that the *Wagon Company* had no right of action; also that the *Wagon Company* had been negligent in not pressing for payment from *J. Nield* and from the *Railway Company*.

*J. Virtue*, the executor of *A. O. Sherriff*, made a similar defence, except as to giving time.

The *Railway Company* (who had been made parties by amendment) made a similar defence, except as to the default of the *Wagon Company* in not pressing the *Railway Company* for payment.

*Romer, Q.C.*, and *Bunting*, for the *Wagon Company*:—

The Defendants allege that the loan is *ultra vires* and illegal, but there is nothing illegal in borrowing money from any one who is willing to lend. Even if the borrowing was *ultra vires*, it is not against common law or statute. The agreement is under seal and valid as it stands, and the Defendants cannot go behind it and bring in parol evidence to shew that it is not the real agreement between the parties. There is no reason why a railway company should not sell all or any part of their rolling stock if they do not thereby stop the working of the railway: *In re Cork and Youghal Railway Company* (1); *Blackmore v. Yates* (2). At all events, the *Wagon Company* must have a right to stand in the place of the creditors of the *Railway Company* who have received the money of the *Wagon Company*. Even if the *Railway Company* is not liable, the sureties are bound, whether the Plaintiffs can or cannot recover against the company: *In re German Mining Company* (3); *Bateman v. Mid-Wales Railway Company* (4).

*Fischer, Q.C.*, and *Cope*, for the *Railway Company*:—

The *Railway Company* cannot borrow beyond the powers given by their Act: *Midland Wagon Company v. Potteries Railway Company* (5). Any security given beyond the power is void under

(1) Law Rep. 4 Ch. 748.

(2) Ibid. 2 Ex. 225.

(3) 4 D. M. & G. 19, 43.

(4) Law Rep. 1 C. P. 499.

(5) 6 Q. B. D. 36.

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7 & 8 Vict. c. 85, s. 19; 30 & 31 Vict. c. 127, s. 4. This is a mere mortgage, and not a sale or hiring; the instalments are calculated to pay off the principal with interest at  $7\frac{1}{2}$  per cent. If the transaction was a loan, which is a question of fact, it is void; and the correspondence and minutes clearly shew that it was a loan, and not a sale and hiring: *Co. Litt.* (1); *Verner v. Winstanley* (2); *Goodman v. Grierson* (3); *Sevier v. Greenway* (4); *Williams v. Owen* (5); *Douglas v. Culverwell* (6); *Gossip v. Wright* (7). If the *Railway Company* make default for one day in paying the last instalment the *Wagon Company* can carry off the rolling stock and stop the railway. The scheme was altogether illegal: *Fountaine v. Carmarthen Railway Company* (8); *Landowners' West of England and South Wales Land Drainage and Inclosure Company v. Ashford* (9). *In re Cork and Youghal Railway Company* (10) was a very peculiar case, and the circumstances there relied upon do not exist here: *Ex parte Williamson* (11). Even if the money has gone to pay the debts of the *Railway Company*, this is a good legal plea, and the equitable right cannot be set up.

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*Higgins, Q.C., and Prior, for Maclure:—*

If this transaction was *ultra vires*, there is no liability on the guarantee, for where there is no principal there can be no surety: *Chapleo v. Brunswick Permanent Building Society* (12); *Rashdall v. Ford* (13). If there is a mistake the surety is not bound: *Eaglesfield v. Marquis of Londonderry* (14); *Beattie v. Lord Ebury* (15); *Macgregor v. Dover and Deal Railway Company* (16). A suretyship *ex turpi contractu* would be void, and this is of that nature. It is more than *malum prohibitum* and is *malum in se*, being a borrowing against express law, and the mode adopted does not signify: *Gardner v. London, Chatham, and Dover Railway*

(1) 205 a, n.

(2) 2 Sch. &amp; Lef. 393.

(3) 2 B. &amp; B. 274.

(4) 19 Ves. 413.

(5) 5 My. &amp; Cr. 303.

(6) 3 Giff. 251; 4 D. F. &amp; J. 20.

(7) 2 N. R. 152.

(8) Law Rep. 5 Eq. 316.

(9) 16 Ch. D. 411, 434.

(10) Law Rep. 4 Ch. 748.

(11) Ibid. 5 Ch. 309.

(12) 6 Q. B. D. 696.

(13) Law Rep. 2 Eq. 750.

(14) 4 Ch. D. 693.

(15) Law Rep. 7 Ch. 777; 7 H. L.

102.

(16) 18 Q. B. 618.

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*Company* (1). A railway company is the creature of law, and can do only what the law authorizes. The directors had no more right to sell their rolling stock than to sell the land on which the railway is made: 30 & 31 Vict. 127, ss. 4, 23. It has been settled that they cannot give their rolling stock as security. It may be that the money, if applied in payment of debts, can be recovered in equity, but that does not make the security good as against the sureties.

*Deane*, for the executor of the other surety.

*Romer*, in reply:—

This is really an undefended action against both principal and surety. The *Railway Company* was in urgent want of money, and might raise it by selling part of their rolling stock and then hire it. The rule that a corporation may not do that which an individual might, must not be extended. It cannot be said that the directors were not justified in getting this money, and no fraud was intended. There is no proof that this was not a genuine sale and hiring, and the *onus* is on the Defendants. The *Wagon Company* knew that they could not safely lend on security of the rolling stock, and why is the Court to suppose that this was not a genuine sale and hiring, and that the *Wagon Company* intended a loan which would be a bad security. No doubt at one time a loan was proposed, but that was given up, and a purchase of the rolling stock was determined on. Where a deed purports to be a conveyance it may be shewn to be a mortgage, but that is on the ground of a fraud upon the conveying party, and no one ever heard of the person to whom the conveyance was made setting up such a case. *Lloyd's* bonds are mere acknowledgments of debts, and are clearly within the statute. In *Chambers v. Manchester and Milford Railway Company* (2) the borrowing was admitted. There is nothing illegal in borrowing money beyond the limit of the statute; it is only *ultrà vires*, and therefore there is no security. A mere borrowing on simple contract is not void. There is no penalty on borrowing. As to the sureties, the guarantee plainly means that if the company does not pay, the sureties will.

(1) Law Rep. 2 Ch. 201.

(2) 5 B. & S. 588.



Dec. 20. KAY, J., after stating the facts of the case and referring to the evidence and the correspondence between the companies:—

I have gone through that correspondence minutely for the purpose of answering the question which I propose to ask myself—whether this was really a transaction of purchase and hire, and, if not, what was the meaning of the transaction? And I come to the conclusion that, from the first and throughout, it was on both sides treated as an advance of £30,000 on the security of the rolling stock. The borrowing powers of the *Railway Company* were exhausted, or nearly so, and as accounts of the *Railway Company* were shewn to the *Wagon Company*, I must infer that the *Wagon Company* knew this. It also appears in the accounts that the *Railway Company* had a large debenture debt, and it is admitted that they were in great want of money. It is plain from this evidence, and, indeed, it was not denied in argument at the Bar, that the transaction was entered into, not at all because the *Railway Company* preferred to hold the waggons on the hire and purchase system, but in order to obtain for them the present use of a sum of £30,000, to provide for pressing obligations. It is a question not of law but of common sense, whether the transaction was a borrowing or not; and I unhesitatingly say that in my opinion it was a loan and borrowing of £30,000, and that the mode in which it was carried out was merely an attempt to give a security for that loan upon the rolling stock, and that this was perfectly well known to both the contracting parties.

Then the second question is, Was this valid or not; does this state of things afford a good defence to the action? If the transaction was valid, it follows that a railway company, having no power to borrow, may in this way turn, at any rate, all its chattels of every sort and kind into money, and, by the fiction of a repurchase, may, in fact, borrow on security of them whatever amount they can induce any one so to lend. Of what use would be the strict limitation by the Legislature of the company's borrowing powers, if, after exhausting them, a company might still borrow on security of its chattels up to their estimated value? I accept the argument that such a dealing would be an invasion of the rights of the debenture holders. Taking their security to

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be merely on the profits of the undertaking, those profits would be seriously interfered with if the rolling stock might be swept away by a subsequent creditor, as it might under this agreement. To prevent such a result, even the remedies of judgment creditors against the rolling stock were taken away by the statute 30 & 31 Vict. c. 127, s. 4. In my opinion the transaction was a mortgage of the rolling stock to secure a loan of £30,000, and was invalid because beyond the powers of the company. I therefore hold the defence to be true in fact, and a good defence to the action against the company.

Then the third question is, whether the defence is available at law or only in equity. The materiality of this question arises from the consideration of this—that if only available in equity the Court may be at liberty to put the company on terms to repay the money, as intimated by Lord Justice *Giffard* in *In re Cork and Youghal Railway Company* (1), and by Lord *Blackburn* in *Chambers v. Manchester and Milford Railway Company* (2). One primary consideration is, as I suggested during the argument, whether the property passed by the pretended sale. Assuming that there was a sufficient delivery, and that the company might under some circumstances have effected a valid sale, as in the case of a *bonâ fide* sale of old rolling stock which was being replaced by new stock, I must say that, in my opinion, this sale was a mere fiction, and that no property passed by the transaction. But still the deeds sued upon are, upon the face of them, simply contracts of hire and purchase; the defence is that they were part only of a larger transaction of borrowing which was illegal and void, and it is argued that this defence can be raised by a plea at law only where the illegality arises from that which is either *malum in se* or *malum prohibitum*, and that this was neither. I think, however, that all difficulty on this point is removed by the well-known judgment of Lord *Wensleydale* in *South Yorkshire Railway and River Dun Company v. Great Northern Railway Company* (3). He there says that corporations are bound by their acts under their corporate seal properly affixed, and he proceeds: “But where a corporation is created by an Act of Parlia-

(1) Law Rep. 4 Ch. 748.

(2) 5 B. & S. 588.

(3) 9 Ex. 55, 84.

ment for particular purposes with special powers, then, indeed, another question arises; their deed, though under their corporate seal and that regularly affixed, does not bind them if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments that the deed was *ultrà vires*, that is, that the Legislature meant that such a deed should not be made." This was followed in the case of *Chambers v. Manchester and Milford Railway Company* (1), which was an action against a railway company on a *Lloyd's* bond, and upon an account stated; the pleas were *non est factum* and never indebted, an equitable plea having been disallowed on the terms that the plaintiff would admit evidence of the matter stated in it to be given under the other two pleas. The borrowing powers of the company had not arisen. Their bankers advanced money on the promissory note of the chairman and another director. This money having been repaid by the chairman, the company gave him the *Lloyd's* bonds in question for the amount. Those bonds did not on the face of them shew that they were given for a loan, and a verdict was entered for the plaintiff, reserving leave to enter a nonsuit, and, a rule *nisi* having been obtained, the case was argued before Lord *Blackburn* and Mr. Justice *Crompton*; they decided that the plaintiff must be nonsuited, that is, that he could not recover on either issue. Mr. Justice *Crompton*, who gave judgment first, said that 7 & 8 Vict. c. 85, s. 19, impliedly prevents any borrowing except in the manner authorized by the special Act; and that sect. 38 of the *Companies Clauses Act*, 1845, coupled with the Act just mentioned, impliedly prevents such borrowing. He then says (2): "That transaction, which was the origin of the whole, and which was in substance a loan, was illegal. These bonds are therefore void, as being without consideration, and also tainted with the illegality of the old transaction for which they were given as a fresh security, and further, as being a direct or indirect mode of borrowing . . ." "The giving of them was for raising money in a way both expressly and impliedly prohibited by Act of Parliament, and therefore void, and the plaintiff cannot recover upon them." Lord *Blackburn*, concurring in the decision, says (3): "My opinion in the

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(1) 5 B. &amp; S. 588.

(2) 5 B. &amp; S. 609.

(3) 5 B. &amp; S. 610.

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present case is based upon this, that the instruments on which the action is brought are instruments which by necessary inference the Legislature intended should not be made, and that this constitutes a good defence at law. If we had to decide whether it was a defence on equitable grounds, it would be necessary to consider what terms should be imposed, and we should have to refer to the decisions in the Courts of Equity. But as there is a defence at law that question does not arise." His Lordship says further that, looking at sect. 19 of 7 & 8 Vict. c. 85, and sect. 38 of the *Companies Clauses Act*, 1845, and the special Act, "It appears clearly by reasonable and necessary inference that the Legislature have restrained the power of the company to borrow money on mortgage or bonds except in the way authorized by the special Act." He then referred to a resolution of the company as proof that the *Lloyd's* bonds were given for money borrowed, and as shewing that the money borrowed was actually a loan to the company. A *Lloyd's* bond is not one of the securities expressly mentioned in 7 & 8 Vict. c. 85, s. 19, but both the learned Judges held that it was impliedly prohibited by the Act, and therefore void. This decision as to such a defence being raised by a plea at law is in accordance with *Fisher v. Bridges* (1), which was followed in *Geere v. Mare* (2), where instruments on the face of them unimpeachable were allowed to be impeached at law by evidence connecting them with a prior illegal transaction. I am, therefore, of opinion that this defence is available under a plea at law.

But then it was admitted that the £30,000 was applied in payment of debts of the company, and I am asked to allow the lenders to stand in the place of such creditors on the authority of *In re Cork and Youghal Railway Company* (3) and *Ex parte Williamson* (4). In the latter case Lord Justice Giffard explained the former decision of Lord Hatherley and himself thus. He says (5): "The next thing to inquire is whether there was an equitable debt. A class of cases has been referred to on that subject, the principal of which are *In re German Mining*

(1) 2 E. &amp; B. 118; 3 E. &amp; B. 642.

(3) Law Rep. 4 Ch. 748.

(2) 2 H. &amp; C. 339.

(4) Ibid. 5 Ch. 309.

(5) Law Rep. 5 Ch. 313.



*Company* (1) and *In re Cork and Youghal Railway Company* (2), the latter of which was before the Lord Chancellor and myself a short time ago. I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle recognised in old cases, beginning with *Marlow v. Pitfeild* (3), where there was a loan to an infant, and the money was spent in paying for necessities, and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held, that although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a Court of Equity and stand in the place of those creditors whose debts had been so paid. That is the principle of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from." I must say, speaking with all possible deference to so great an authority, that the analogy seems to me not satisfactory. The equity in the case of an infant is carefully confined to an advance for necessities, or to pay a debt incurred for necessities, as in *Marlow v. Pitfeild*, whereas the decision in the *Cork and Youghal Railway Company's* case seems to be that the equity arises if the moneys have been applied in paying any debts of the company. Moreover, to treat a railway company like an infant who must have necessities to sustain life, seems to me a very strained comparison. Further, if a company can always borrow money for payment of its debts, that practically enlarges the power of borrowing indefinitely. In my opinion, much the better course would be to leave companies and those who deal with them to all the consequences of doing acts which are known to both to be *ultra vires*. Lord Justice Giffard classes together, in what I have just read, the two cases of *In re German Mining Company* and *In re Cork and Youghal Railway Company*; but certainly the former case affected to proceed on a totally different principle, namely, that the advance was not by a stranger but by a trustee, though Lord Justice Turner refers to

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(1) 4 D. M. &amp; G. 19.

(2) Law Rep. 4 Ch. 748.

(3) 1 P. Wms. 558.

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some debts, as for wages of workmen, which a mining company might impliedly authorize its managers to contract, but not to borrow money to pay. I desire to call attention to the very careful language of Lord Justice *Turner* in that case (1): "The Appellants' argument upon this point rested mainly upon several cases which have been determined at law: *Burmester v. Norris* (2); *Ricketts v. Bennett* (3), and the cases there cited. Those cases seem to me fully to establish this position, that the acting manager of a mine, whether he be a shareholder in the mine or not, has no power to render his co-shareholders liable for money borrowed, although it may be borrowed for the necessary purpose of carrying on or even of preserving the mine; and the Appellants, adopting this position, contended that the distinction between moneys borrowed and debts contracted was too narrow and refined to be acted upon by the Courts. But this distinction seems to me to be established and to rest upon sound principles. The distinction is well marked in the cases upon the *Trevolvas Mine*. In one of those cases, *Hawtayne v. Bourne* (4), it was held that the shareholders were not liable for moneys borrowed by the agent in order to pay the arrears of the wages due to the labourers in the mine; but in another of those cases, *Hawken v. Bourne* (5), it was held that a shareholder was liable for goods supplied for the necessary working of the mine on the order of the resident agent. What is the distinguishing principle between these cases? I take it to be this. It is not according to the usual course of business for the manager of a mine to borrow moneys for the purpose of carrying on the mine; and, therefore, where money is lent to the manager of a mine the party lending it must look to the power of borrowing with which the manager is invested, and can recover over against the parties who have authorized the borrowing of the money; but, on the other hand, wages must become due to the miners, and goods must be bought upon credit by the manager of a mine, and the shareholders therefore are considered to have authorized the manager to incur such expenses and contract such debts, and consequently are held liable for such expenses and debts. Surely this distinction is sound in principle. To hold the

(1) 4 D. M. & G. 39. *17 May 1881* (3) 4 C. B. 686.

(2) 6 Ex. 796.

(4) 7 M. &amp; W. 595.

(5) 8 M. &amp; W. 703.

shareholders liable for moneys borrowed by the manager without their authority would be unjust, for then they would be liable whether the moneys borrowed were expended upon the mine or not; but there is not the same injustice in holding them liable for wages incurred and debts contracted for the purposes of the mine; for then they have the benefit of the expenditure."

I am not satisfied that the borrowing being by a trustee, was not to some extent the reason of the decision of the *Cork and Youghal Railway Company's* case (1), where the advance was made by an agent of the company. I of course am bound by the decision, and must apply it in a case which is similar. In this case, however, there is no pretence that the loan was made by a trustee or by a person or company in any fiduciary relation to the borrower.

This railway company is now, I understand, in the hands of a receiver, and it is said that it is insolvent even as to its debenture debt. There is no claim made on the pleadings for such relief as was given in the *Cork and Youghal Company's* case, but I am asked to give leave to amend, if necessary, in order to raise such a claim. On the whole, I do not think I ought to allow such an amendment for the purpose of directing what would probably be a fruitless inquiry.

There remains the case against the chairman, Mr. *Maclure*, and the other directors who signed the guarantees. Mr. *Maclure* pleads that the agreements were made under the following circumstances:—

The fifteen engines and 200 waggons were, at the time such agreements were made, in fact the property of the *Cornwall Minerals Railway Company*. That company, being desirous of borrowing a sum of money, and having no available borrowing powers under their Acts, as the Plaintiff company were at that time fully aware, agreed with the Plaintiff company that the loan should be made to the *Railway Company* by the Plaintiff company of the sum of £30,000, and that by way of repayment by instalments of the principal sum borrowed, and payment of interest thereon, the *Railway Company* should pay to the Plaintiff company certain fixed quarterly sums for the period of five years; and to disguise the fact that such transaction was a loan, and

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that such payments were for such principal and interest, and to give a colour to the transaction, it was further agreed that there should be a nominal sale by the *Railway Company* to the Plaintiff company of the engines and waggons; and that formal agreement should be made as if there were a loan with an option to purchase at a nominal sum. Such borrowing was *ultrà vires* the *Railway Company*, and illegal, as the Plaintiff company well knew at the time of their making the loan. Then he also pleads that as to certain instalments time was given to the *Railway Company* for payment of them, and that that releases his suretyship.

The Defendant *Virtue*, who is the executor of another deceased director, raises practically the same defence of *ultrà vires*, but does not raise any defence on the ground of giving time. Now, as to giving time, it appears that the instalments in respect of which time was given have been paid, and that defence, if available, does not apply to the instalments now sued for. I do not therefore consider the other replies to that plea, which appear to me also to be good.

Mr. *Maclure* was chairman of the company throughout this transaction, and his defence, to say the least of it, is startling. It is not less so because the solicitors of the company, who seem to have advised the directors that the transaction was legal and right, as appears by the minute of the 6th of April, 1876, are the solicitors on the record for Mr. *Maclure* in this action. It was argued by his counsel that, looking to the effect on the debenture holders, the transaction was *malum in se*, and language was used which seemed to me at the time not only strange on his behalf, but utterly unwarranted by the facts of the case. I see no reason for believing that the directors did anything *malum in se*. They conceived they had hit upon a lawful mode of evading the Acts of Parliament, and seem to have been so advised, but the real question is whether there was not consideration for their guarantee. In the *German Mining Company's* case (1) the money was paid by the guarantors after the first decision, as appears at p. 43 of the report, no doubt being suggested as to their liability to pay it. In *Chambers v. Manchester and Milford Railway Company* (2) Lord *Blackburn* says this:

(1) 4 D. M. & G. 19. *17/11/76* (2) 5 B. & S. 588, 612.



"The Plaintiff had become security for a loan to the company by signing a joint promissory note. When the note became due the bank had a right to come upon him and the co-surety, but he could not have sued the company for money paid to their use; he paid it to discharge a loan which was not contracted by the company in compliance with the restrictions imposed by their Act." Lord *Blackburn* there does not doubt the right of the lender to recover against the sureties, although the loan was to a railway company which could not borrow. Probably the very reason in this case for requiring the guarantee was the doubt that existed whether the company could be compelled to repay the money. I asked for authority upon this point, but none was cited. I therefore must decide that the directors are liable upon their guarantees.

Upon the whole case, I hold that the transaction was a borrowing by the railway company, and an attempt to give a security for the loan on the rolling stock, and that this, so far as the company was concerned, was *ultra vires* and void. I must therefore dismiss the action against the company. I must declare that the sureties are liable for the unpaid instalments of the loan which are covered by their guarantees, I must order payment by *Maclure*, and, if required, there must be an administration order against the estate of *Sherriff*. The Plaintiffs must pay the railway company's costs, and *Maclure*, and *Sherriff*'s executors must pay the Plaintiffs' costs against them.

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Solicitors for Plaintiffs: *Singleton & Tattershall*.

Solicitors for the *Wagon Company* and for *Maclure*: *Cope & Co.*

Solicitors for the executors of *Sherriff*: *Morley & Shirreff*.

C. M.

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HENTY v. WREY.

[1881 H. 529.]

Jan. 12, 16, 18.

*Power—Appointment of Portions before required—Fraud on Power—Discretionary Trust—Joint Tenancy and Tenancy in Common.*

*B. W.*, having a power of appointing portions charged upon real estate for younger children in proportion to the number of such children, and, having only three daughters, aged nine and seven years and one year, appointed £10,000, being the full amount he was entitled to charge, for the portions of his three daughters, to be a vested interest in such children respectively, immediately, but to be paid at such times and in such proportions as he should by deed or will appoint, and in default of appointment to be paid to them share and share alike at their age of twenty-one years or marriage if after his death, or, if the same should happen during his life, then at his death, with maintenance at the rate of £4 per cent. from his death. One daughter married and attained twenty-one, and on her marriage *B. W.* appointed £5000 to her. The other two daughters died under twenty-one and unmarried. The married daughter assigned to *B. W.* the interest she was supposed to have in the remaining £5000 as surviving joint tenant with her two sisters, and *B. W.* then assigned his interest on his death in the £5000 to the Plaintiff in consideration of £3000, and that assignment contained a covenant on the part of *B. W.*, his executors, administrators, and assigns, for quiet enjoyment:—

*Held*, that the appointment by *B. W.* was invalid so far as it directed the portions to vest immediately, that as to the portions of his two deceased daughters who did not live to require them they sank into the estate; that the three children were tenants in common and not joint tenants, that the assignment to *B. W.* by the married daughter was ineffectual, and the purchaser from *B. W.* took no portion of the appointed fund:

But, *held*, that the purchaser was entitled, under the covenant for quiet enjoyment in the assignment to him, to prove against the estate of *B. W.* for damages to the amount of £3000, the purchase-money so paid by him and interest thereon.

*Reverend on off HENTY v. WREY*  
THE statement of claim was to the following effect:—

By an indenture dated the 2nd of February, 1825, certain hereditaments therein mentioned and situate in the county of Devon were limited to such uses as Sir *Bouchier Wrey* and Sir *Bouchier Palk Wrey* should jointly appoint, and in default of such appointment to the use of Sir *B. Wrey* for his life, with remainder to the use of Sir *B. P. Wrey* for his life, with remainder to the use of the first and other sons of Sir *B. P. Wrey* in tail male, with

remainder to the use of *Robert Bouchier Wrey* for life, with remainder to the use of the first and other sons of *Robert B. Wrey* in tail male, with remainder to the use of the Defendant *Sir Henry Bouchier Wrey* for his life, with remainder to the use of the first and other sons of *Sir Henry B. Wrey* successively in tail male, with remainder to the use of the heirs and assigns of *Sir Bouchier Wrey* for ever.

And the indenture contained a power of jointuring and a power for *Sir B. P. Wrey*, and also for the person who for the time being should be in the actual possession or entitled to the rents and profits of the said hereditaments, by any deed or deeds, with or without power of revocation or by his will, to charge all or any of the said hereditaments with the raising of such sums of money for the portions of his child or children other than and besides an eldest or only son for the time being entitled under the limitations thereinbefore contained to the said hereditaments for an estate in tail male in remainder expectant on his father's decease as thereafter mentioned, (that is to say) if there should be but one such child, the sum of £4000 for the portion of such one child ; if there should be two such children, the sum of £8000 for the portions of two such children ; and if there should be three or more such children the sum of £10,000 for the portions of such three or more children, with interest for the sums so to be charged at any rate not exceeding £4 per cent., such sums to be an interest vested in and to be paid to the child or children for whom the same were intended to be thereby provided on or at such age, day, or time, or respective ages, days, or times, and to be divided between them or any of them (if more than one) in such shares and to be attended with such provisions for their respective advancement and education as the person making such charge should think fit. And that, for effectuating and facilitating the raising of such portion and portions and yearly sums for advancement and education, it should be lawful for the person making any such charge as aforesaid to limit and appoint the said hereditaments and premises so to be charged, to any person or persons as a trustee or trustees for any term or terms of years without impeachment of waste, In trust by mortgage or other disposition of the hereditaments to be comprised in such term or terms, or by

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and out of the rents, issues, and profits thereof, or by all or any of the said ways and means, or other reasonable ways or means, to levy and raise all such sum and sums so to be charged and which should become payable.

Sir *B. Wrey* died in 1826, and the joint power of appointment by the last-mentioned indenture reserved to him and Sir *B. P. Wrey* was never exercised.

By an indenture dated the 17th of March, 1828, and made between Sir *B. P. Wrey* of the one part, and *Robert Bouchier Wrey* and *Jacob Mould* of the other part, after reciting that Sir *B. P. Wrey* had issue by his then wife, *Ellen C. Wrey*, three children, namely, *Ellen Caroline*, who afterwards married *Edward Joseph Weld*, *Emily Frances* and *Georgina Ann*, it was witnessed that in exercise of the power given to him by the deed of the 2nd of February, 1825, he, Sir *B. P. Wrey*, thereby charged the hereditaments comprised in such deed, with their appurtenances, with the raising and payment of £10,000 for the portion or portions of his said three children, to be a vested interest in the said three children respectively, immediately upon the execution of the indenture, and to be paid to them with provision for their maintenance in manner therein mentioned; and, for further securing the raising of the said sum of £10,000 and the maintenance therein provided for the said three children, Sir *B. P. Wrey* thereby limited and appointed the said hereditaments unto trustees for the term of 500 years, to commence from the decease of Sir *B. P. Wrey*, upon trust, out of the rents, issues, and profits thereof, to raise the said sum of £10,000 for the said portions, such portions to be paid and payable at such times and in such proportions and manner as Sir *B. P. Wrey* by any deed or by his will should appoint, and, in default of appointment, to be paid to such children respectively, share and share alike, at their age of twenty-one years or day of marriage (which should first happen) if the same age or time should happen after the decease of Sir *B. P. Wrey*, but if the same should happen in the lifetime of Sir *B. P. Wrey*, then the portions should be postponed until after his death, unless he should signify his consent in writing, that the same should be raised and paid in his lifetime; and upon further trust after the decease of Sir *B. P. Wrey*, by and out of the rents, issues, and profits of the



hereditaments comprised in the said term of 500 years, to levy and raise, for the maintenance and education of the said children respectively, such yearly sum and sums of money for each of them as would be equivalent to the interest of the portion thereby provided for them, after the rate of £4 per cent. per annum, and to pay and apply such sums for the maintenance and education of such child or children respectively. And the said indenture contained a power enabling Sir *B. P. Wrey* to alter or vary or absolutely to revoke the appointments therein expressed, and to appoint or declare any other uses, estates, or interests concerning the said hereditaments in such manner as he should think proper.

By an indenture dated the 10th of July, 1832, and indorsed upon the last-mentioned indenture, Sir *B. P. Wrey* charged the said hereditaments with the payment of £10,000 for the portions of his said three daughters, to be a vested interest in such children respectively, immediately upon the execution of the said indenture, and to be paid to them with such provision for their maintenance in the manner mentioned in the deed of the 17th of March, 1828.

*Emily Frances Wrey* died in the year 1836, aged fifteen years, and *Georgina Ann Wrey* died in the year 1845, aged eighteen years.

By a deed-poll, dated the 30th of August, 1851, after reciting the death of the two daughters, Sir *B. P. Wrey* appointed that the sum of £5000, part of the said sum of £10,000 provided for the portions of the three children, should, immediately after his decease, be raised and paid to *Ellen Caroline Weld*, her executors, administrators, or assigns, for her separate use.

By an indenture dated the 22nd of November, 1851, and made between Sir *B. P. Wrey* of the one part, *Edward Joseph Weld* and *Ellen Caroline Weld*, his wife, of the second part, and two trustees of the third part, after reciting that, inasmuch as by virtue of the before-mentioned trusts and appointments, the said *Emily F. Wrey* and *Georgina A. Wrey* were, at the time of their respective deaths, entitled to vested interests in so much of the before-mentioned £10,000 as had not been appointed in favour of *Ellen Caroline Weld*, and they had died without having been

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married and intestate, their father, Sir *B. P. Wrey*, was solely entitled to such their shares and interests in the said £10,000, and reciting that Sir *B. P. Wrey* was desirous of settling the said shares and interests to which he had so become entitled of the £10,000, and reciting that owing to the absence of a hotchpot clause in all the before-mentioned deeds, it had been suggested that *Ellen Caroline Weld* and *Edward J. Weld* in her right, was, or would eventually become, entitled to one-third of the £5000 of the portion fund left unappointed by the deed-poll of the 30th of August, 1851; but inasmuch as the said *E. J. Weld* and *Ellen Caroline Weld* were aware that such appointment was made by Sir *B. P. Wrey* under the impression that he would be exclusively entitled in right of his deceased daughters to the remaining £5000, and as the effect of such appointment was to benefit the said *Ellen Caroline Weld* to the extent of the difference between one-half and one-third of the said portion fund of £10,000, therefore the said *Edward Joseph Weld* had agreed that the unappointed sum of £5000 should be deemed and taken to belong exclusively to Sir *B. P. Wrey*, and that he might make such disposition thereof as he might think proper. And for the purpose of giving effect to such agreement, the said *E. J. Weld* and *Ellen Caroline Weld* had agreed to join in the assignment and declaration and covenant thereafter contained. It was witnessed that in order to effectuate such his desire, he, Sir *B. P. Wrey*, did thereby assign, and the said *E. J. Weld* and *Ellen Caroline Weld*, in respect of her sole and separate estate, and also so far as might be necessary so to bind herself morally, did assign and confirm unto the two trustees therein named all that the sum of £5000, being part of the said portion fund of £10,000 left unappointed as aforesaid, to hold the same upon the trusts thereafter declared of the same. The trusts were afterwards declared to be in trust absolutely for Sir *B. P. Wrey*, as part of his personal estate, in case he should survive *Eliza Wrey*, his then wife, (which event did happen).

By an indenture dated the 23rd of August, 1875, and made between Sir *B. P. Wrey* and the Plaintiff, *Edwin Henty*, it was witnessed that, in consideration of £3000 to Sir *B. P. Wrey* paid by the Plaintiff, Sir *B. P. Wrey* assigned to the Plaintiff, his executors, administrators, and assigns, the said sum of £5000,

being one equal half part of the said sum of £10,000 raisable and payable, after the decease of Sir *B. P. Wrey*, by virtue of the several before-mentioned deeds and the interest to accrue thereon, with power for the Plaintiff to demand, sue for, recover, and receive, and to give valid and effectual receipts, discharges, and releases for the said sum of £5000 and interest, and to hold the same unto the Plaintiff, his executors, administrators, and assigns, for his own proper use and benefit absolutely. And Sir *B. P. Wrey*, for himself, his heirs, executors, and administrators, thereby covenanted with the Plaintiff, his executors, administrators, and assigns, that notwithstanding anything by him, the said Sir *B. P. Wrey*, at any time done or knowingly suffered, he, Sir *B. P. Wrey*, then had good right to assign the said premises thereinbefore expressed to be assigned, subject as in manner thereinbefore mentioned. And, further, that the Plaintiff, his executors, administrators, and assigns, should and might receive, take, and enjoy the said premises thereinbefore expressed to be assigned, and every part thereof, to and for his and their own use and benefit accordingly, without any interruption, claim, or demand whatsoever, by or from the said Sir *B. P. Wrey*, his executors or administrators, or any person or persons then or thereafter having or possessing any right, title, or interest at law or in equity to, in, or out of or respecting the same or any part thereof, and for further assurance.

Sir *B. P. Wrey* died on the 11th of September, 1879, having by his will appointed the Defendant *Henry Smith* his sole executor, and upon his death the two sums of £5000 each became payable, as regards the first sum of £5000, to the legal personal representatives of *Ellen Caroline Weld* and *E. J. Weld* (to whom the same had been paid), and as regarded the secondly-mentioned sum of £5000, as the claim alleged, to the Plaintiff. The said *Robert Bouchier Wrey* died without issue male in the lifetime of Sir *B. P. Wrey*, and upon the death of Sir *B. P. Wrey* the Defendant Sir *Henry B. Wrey* became tenant for life in possession of the estates comprised in the settlement of 1825, and the Defendant *Henry B. Toke Wrey*, his eldest son, became tenant in tail male of the said estates in reversion expectant on the death of his father, and the same Defendants had since barred the entail in the estates,

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and had limited the same to such uses and generally in such manner as they should by deed jointly appoint.

The Plaintiff claimed to have raised and paid to him the said sum of £5000 so charged on the hereditaments comprised in the indenture of February, 1825, and secured by the term of 500 years, and assigned to the Plaintiff by the deed of the 23rd of August, 1875, and all proper interest on the said sum as from the death of Sir *B. P. Wrey*, subject to the payment of legacy or succession duty, if any, payable in respect thereof, or if, contrary to the aforesaid contention of the Plaintiff, the Court should be of opinion that the £5000 was not properly chargeable upon or raisable or payable to the Plaintiff out of the said hereditaments, then the Plaintiff claimed damages against the estate of Sir *B. P. Wrey* by reason of the breach of representation made by him, and the breaches of the covenants contained in the indentures of the 22nd of November, 1851, and the 23rd of August, 1875, respectively, and, as such damages, the Plaintiff claimed the sum of £5000 with interest for the same at the rate of £4 per cent. per annum from the day of the death of Sir *B. P. Wrey*, and to have payment thereof made to him out of the estate of Sir *B. P. Wrey*, or otherwise to be at liberty to prove for the same in the action in this Court, in which the estate of Sir *B. P. Wrey* was being administered.

The Defendants Sir *Henry B. Wrey* and *Henry B. Toke Wrey* by their defence submitted that the indenture of the 10th of July, 1832, was a *pro tanto* revocation of the alleged appointment of £10,000. That neither at the date of the indenture of the 17th of March, 1828, nor at any time thereafter, were there any circumstances in respect of the two younger daughters of Sir *B. P. Wrey*, namely, *Emily Frances Wrey* or *Georgina Ann Wrey*, such as to justify or authorize the charging, creation, or raising of any portion for them under the power contained in such indenture. They never needed any portion nor received any benefit from either of the indentures. That neither of such indentures, so far as affecting to benefit the said two children or creating a charge in their favour, was a due exercise of the said power, but, on the contrary, each of such indentures was either *ab initio* inoperative, or, at any rate, became so under the circumstances which happened.



That neither the said sum of £5000 claimed by the Plaintiff, nor any part thereof, nor any interest thereon, had ever become payable, or ever effectually charged on the hereditaments in such indenture mentioned.

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*Ince*, Q.C., and *Townsend*, for the Plaintiff:—

The difficulty in this case arises from the various decisions upon the subject, very few of which are of recent date. We contend that the appointment made by Sir *B. P. Wrey* amongst his children was good, notwithstanding that the appointees did not at the time require their portions. There are many cases in support of our argument, and those in opposition to it seem to have rested upon the ground of fraud, which is entirely absent here. Lord *St. Leonards*, in his book on Powers (1), puts the question as one of fraudulent intention, and he quotes cases of that nature. In *Lady Wellesley v. Earl of Mornington* (2), where a father, having power to appoint portions among his younger children, appointed a very large portion to a son who was of age, but was a lunatic and likely to die, it was held to be fraudulent and void because the object of the father was to obtain the portion for himself as personal representative of his son; but a *bonâ fide* appointment to an infant, an only child in good health, though made with a view to defeat a gift over, and though the child died before attaining twenty-one, was supported in *Beere v. Hoffmister* (3). The point in our favour in this case is that the father was not appointing to one child only, but to all his children, and as a matter of fact two of the appointees lived for many years, although they died eventually under twenty-one, and the other attained twenty-one and married. In *Fearon v. Desbrisay* (4), where an appointment of portions by a father was executed in favour of all his children, at a time when he had one child eight months old and another *en ventre sa mère*, and the appointment was to vest immediately, it was held that this was not a fraud upon the power, and the mother was entitled to the share of one of the children who died an infant. In *Coffin v. Cooper* (5) and in *Palmer v. Locke* (6) we have autho-

(1) 8th Ed. p. 608.

(2) 2 K. & J. 143.

(3) 23 Beav. 101.

(4) 14 Beav. 635.

(5) 2 Dr. & Sm. 365.

(6) 15 Ch. D. 294.

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rities confirmatory of a power of this nature. It is true that such a power is in some sense fiduciary, but only to this extent, that the donee of the power cannot use it for any corrupt purpose, and fraud cannot be presumed, it must be proved by those who suggest it.

*Roach v. Trood* (1) is also in our favour; and the judgment of the Court, delivered by Lord Justice *Baggallay*, shews clearly that to invalidate a power to appoint portions you must prove an intention of defeating the purposes of the power, and it is not sufficient that the result has been a benefit to the appointor. The case of *In re Marsden's Trust* (2) was there distinguished, and it was shewn that in that case Vice-Chancellor *Kindersley* considered there was evidence that the power had been exercised in such a way as to defeat the purpose for which it was given. *Topham v. Duke of Portland* (3) was decided both by Vice-Chancellor *James* and the Court of Appeal on similar grounds. The circumstances of this case cannot bring it within the principle of those two authorities.

But supposing that the Court should be of opinion that the appointment was not valid, then we say that the Plaintiff, who purchased the reversionary interest in the £5000, would be entitled to prove for that amount against the estate of Sir *B. P. Wrey* under the covenants contained in the purchase-deed.

*Macnaghten*, Q.C., and *Medd*, for the Defendant Sir *Henry Wrey*, the first tenant in tail:—

First, we say that an appointment cannot be executed by the person having the power until the portion is required by the appointee. This was laid down in *Lord Hinchinbroke v. Seymour* (4), where the Lord Chancellor said, "The meaning of a charge for children is that it shall take place when it shall be wanted. It is contrary to the nature of such a charge to have it raised before that time." So, in *Edgeworth v. Edgeworth* (5), it was held that an appointment of "reasonable portions" must be reasonable in time as well as in amount. In *Tankerville v. Coke* (6) the Court was

(1) 3 Ch. D. 429.

(2) 4 Drew. 594.

(3) Law Rep. 5 Ch. 40.

(4) 1 Bro. C. C. 395.

(5) Beat. 328.

(6) Mosely, 146.

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of opinion that an unreasonable execution of a power would be relieved against. There were decisions to the same effect in *McQueen v. Farquhar* (1), *Remnant v. Hood* (2), and *Davies v. Huguenin* (11).

It is impossible to suppose that a child of one year old can require a portion, and, without contending that there was a fraudulent intention of the father, we say that the appointment was void as to the two children who died under twenty-one.

Then we submit that under any circumstances the deed of the 22nd of November, 1851, by which the married daughter, Mrs. *Weld*, and her husband assigned to Sir *B. P. Wrey* the supposed interest which devolved upon Mrs. *Weld* in consequence of her being a joint tenant with her two deceased sisters, could have no effect, since there was no joint tenancy, but a tenancy in common. That deed, however, would seem to shew that the father when he made the appointment had in view the probability of his becoming entitled in right of his children, or some of them, to the shares appointed to them. He appointed the utmost amount he was entitled to charge, and by that means he had at any rate a chance of some of the portions falling in to him. We submit that the Court will not enforce such an exercise of the power. In all appointments of portions in favour of infants raisable out of land, where on the death of the appointees under age the appointor takes the appointed fund, the *onus* of shewing that the appointment was a proper one lies on the appointor.

*Romer, Q.C., and C. Browne*, for the legal personal representatives of Sir *B. P. Wrey* :—

It is not quite correct to say that this appointment was made to the full extent of the power in order to have the chance of failure in any one or more of the children. Under the original power Sir *B. P. Wrey* could only appoint the full amount in case of his having three children, which he had. The portions were made to vest immediately, and this was done in the interests of all the children, because the true effect of the deed is clearly to vest the money in the children as joint tenants, and then he

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(1) 11 Ves. 467.

(2) 2 D. F. &amp; J. 396.

(3) 1 H. &amp; M. 730.

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retained to himself the power to say how the money should be divided amongst them. If it had been a tenancy in common the shares must have been at once determined, but he reserved the right of dividing it as he should think fit, though in case the children attained twenty-one they were to take as tenants in common equally. This shews that the appointment was made exclusively in the interest of the children.

Then as regards the claim by the purchaser against the estate of Sir *B. Wrey*. It is evident that the Plaintiff must have known what title the vendor had. It was his duty to ascertain it, and the mere assertion by a vendor that he had a good title, on the faith of which a purchaser relies, without investigating the title, is not necessarily such a misrepresentation as will preclude the vendor from enforcing the contract. That was decided in *Hume v. Pocock* (1).

*Waller*, Q.C., and *Bush*, for the surviving trustee.

*Ince*, in reply:—

I admit that a father must not appoint with the corrupt motive of getting the property for himself, but there is no rule of law under which the appointor is prevented from taking any benefit of an advantage coming to him in the course of nature. There is no impropriety in making an appointment under which, in the course of nature, he may possibly obtain a benefit for himself. The cases of *Butcher v. Jackson* (2), *Hemming v. Griffith* (3), and *Knapp v. Knapp* (4), are distinctly in favour of this power being valid.

Jan. 18. KAY, J., after stating the facts of the case, continued:—

The question that arises from this state of facts is whether the appointment charging these portions is good altogether, or whether it ought to be controlled, at least as to the direction that they shall vest immediately in the daughters.

It seems to be settled by authority that in the case of a portion charged on land, if no time is limited for the vesting or payment,

(1) Law Rep. 1 Ch. 379.

(2) 14 Sim. 444.

(3) 2 Giff. 403.

(4) Law Rep. 12 Eq. 238.



and the child for whom it is intended should die under twenty-one and unmarried, the portion would not be raisable, but would sink for the benefit of the estate: see *Brewin v. Brewin* (1); *Smith v. Smith* (2); *Lady Poulet v. Lord Poulet* (3); *King v. Withers* (4); *Carter v. Bletsoe* (5); *Boycot v. Cotton* (6); *Remnant v. Hood* (7); *Davies v. Huguenin* (8).

The same cases shew that if the portion be made payable at twenty-one or marriage, and the child dies before, it will sink, and this although limited by words which would confer a vested interest in a personal legacy: *Lady Poulet v. Lord Poulet*.

A power of appointing portions is said, by Vice-Chancellor *Kindersley* in *In re Marsden's Trusts* (9), to be "only one form of a discretionary trust to be exercised for the benefit of certain objects, or some of them. The objects of the power are the children of the marriage; and the purpose of the settlement was to make a provision for their benefit, but at the same time to reserve to the mother such a power as would keep the children under her control, and to enable her to distribute the property among them in such manner as, in her opinion, their respective wants and interests and the exigencies of the case might require. The same general principles which are applicable to discretionary trusts in general are applicable to this particular species of discretionary trust. Unless it can be shewn that the trustee having the discretion exercises the trust corruptly or improperly, or in a manner which is for the purpose, not of carrying into effect the trust, but defeating the purpose of the trust, the Court will not control or interfere with the exercise of the discretion. There may be a suspicion that the trust has been exercised in a particular manner and from a certain motive, which, if it could be proved, would be held not to be a proper motive; but if it be mere suspicion—though suspicion is ground for jealous investigation—if it be mere suspicion and not matter amounting to a judicial inference or conviction from the facts, the Court will not act upon it. But if, on the other

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(1) Prec. in Ch. 195.

(2) 2 Vern. 92.

(3) 1 Vern. 204, 321.

(4) Cas. t. Tal. 117.

(5) Prec. Ch. 267; 2 Vern. 617; 2 P. Wms. 612.

(6) 1 Atk. 555.

(7) 2 D. F. &amp; J. 396.

(8) 1 H. &amp; M. 730.

(9) 4 Drew. 594, 599.

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hand, it can be proved to the satisfaction of the judicial mind that the power has been exercised corruptly, or for a purpose which defeats, instead of carrying into effect, the purpose of the trust, then the Court will not permit such an exercise of the power to prevail." Lord *Hardwicke*, in *Boycot v. Cotton* (1), says: "It is settled now whether the portion charged upon land be given with or without interest by deed or by will, if the person dies before the age at which it becomes payable it shall sink into the estate." Lord *Thurlow*, in *Godwin v. Munday* (2), says: "In the case of portions sinking because the party never attained such an age as to want them, Lord *Talbot* said it was *causa data et non secuta*; *King v. Withers* (3). Even if the reasoning in that case should be thought too nice, it is now too late to overturn the rule." But he points out this as a doctrine peculiar to portions, and not applicable to a gift of a charge as part of the estate.

In *Lord Hinchinbroke v. Seymour* (4), where the power was to charge £10,000 for portions to be paid at such times as the tenant for life should by deed or will appoint, and he appointed all to his younger child, a daughter then fourteen years old, to be raised "immediately," and on her decease the tenant for life claimed the fund as her administrator, Lord *Thurlow* said (4): "The meaning of a charge for children is that it shall take place when it shall be wanted. It is contrary to the nature of such a charge to have it raised before that time, and although the power is in this case to raise it when the parent shall think proper, yet that is only to enable him to raise it in his own life if it should be necessary. It would have been very proper so to do upon the daughter's marriage, or for several other purposes, but this is against the nature of the power," and he dismissed the bill of the tenant for life.

It is said that was a case in which the daughter was in bad health at the time of the appointment, and that there was therefore sufficient evidence of a corrupt motive, and reference is made to Lord *Eldon's* notice of the case in *McQueen v. Farquhar* (5), in which he takes this view, which was suggested to him in the argument.

(1) 1 Atk. 555.

(2) 1 Bro. C. C. 191, 193.

(3) 3 P. Wms. 414; Forrester, 117.

(4) 1 Bro. C. C. 395.

(5) 11 Ves. 479.

I have sent for the record of *Lord Hinchinbroke v. Seymour* (1), but it seems it cannot be found. In its absence, I must say that Lord *Thurlow's* language, which I have read, seems to me totally inconsistent with the notion that his decision proceeded upon any such ground. In the case of *Edgeworth v. Edgeworth* (2) and *Wellesley v. Lord Mornington* (3), Sir A. Hart and Lord *Hatherley* declined to accept this interpretation of that decision.

I must treat *Lord Hinchinbroke v. Seymour* as a direct decision that, in the events which have happened in this case, the £5000 ought not to be raised.

The principle seems to be, that a power of this kind being in the nature of a discretionary trust, the appointor must be taken to know that it is contrary to the nature of the trust to make an appointment so as to vest immediately portions in children of tender years, and such an appointment would therefore be so improper that the Court would control it by refusing to allow the portions to be raised if the children did not live to want them.

If it were necessary to go further, I must say I think the facts are sufficient to raise what Vice-Chancellor *Kindersley*, in the passage I have read, calls a "judicial inference" that the intention of the appointor in making the portions vest immediately was to secure a possible benefit to himself. He had three daughters and no son. A year after the birth of the last daughter he makes this charge, to vest immediately, upon an estate which, if no son should be born to him, would go to other persons. I cannot see any reason why these portions should be directed to vest immediately except to benefit himself. The portions would not be raisable till his death. He gave maintenance only from that time, and directed that they should be payable at twenty-one or marriage. He did not provide for any advancement meanwhile.

I therefore hold that this £5000 for the two younger children who died in their father's lifetime without attaining twenty-one or marrying sinks into the estate and is not raisable, thus controlling that part of the appointment which directed that the portions should vest immediately.

It has been argued, however, that the appointment was to the

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(1) 1 Bro. C. C. 395.

(2) Beat. 328.

(3) 2 K. &amp; J. 153.

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three daughters as joint tenants, that the survivor took the whole £10,000, and that the assignment by Mrs. *Weld* and her husband passed her interest in this £5000 to Sir *Bouchier Palk Wrey*, who sold it to the Plaintiff.

I am of opinion that they were not joint tenants, but tenants in common, and that this argument cannot prevail.

Then the Plaintiff claims against the legal personal representative of Sir *Bouchier P. Wrey* under the covenants contained in the deed of the 23rd of August, 1875, by which Sir *Bouchier P. Wrey* assigned the £5000 to the Plaintiff.

This deed recites that by virtue of the original settlement, the appointment, the deed-poll, and the deed of the 22nd of November, 1851, and in consequence of the death of the two younger daughters without having been married and intestate, leaving Sir *Bouchier P. Wrey* their sole next of kin, Sir *Bouchier P. Wrey* was absolutely entitled to the £5000 in reversion expectant on his own death. Then follows the assignment to the Plaintiff, subject to legacy or succession duty, but free from all other incumbrances.

There is no covenant that the appointment was good, and the covenant that Sir *Bouchier P. Wrey* had good right to assign is limited in the usual way by the words, notwithstanding anything done or knowingly suffered by him. But the covenant for quiet enjoyment is not so restricted, but is expressly that the assign shall or may receive, take, and enjoy the £5000 without any interruption, claim, or demand by Sir *Bouchier P. Wrey*, his executors, administrators, or assigns, "or any person or persons now or hereafter having or possessing any right, title, or interest at law or in equity to, in, out of, or respecting the same or any part thereof." The persons interested in the estate claim the right to prevent this money being raised. Can it be maintained that this is not a right respecting the fund? I think it is, and therefore comes within the words and spirit of this covenant.

Consequently I must hold that the Plaintiff is entitled against Sir *Bouchier P. Wrey's* estate to have a return of his purchase-money, with interest at 4 per cent.

For this he must prove under the administration decree against Sir *Bouchier P. Wrey's* estate.



The action must be dismissed with costs against the owners of the property sought to be charged.

The Plaintiff is entitled to costs out of Sir *Bouchier P. Wrey's* estate, and may prove for them also.

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Solicitors: *Hadden, Woodward, & McLeod; Morice & Toller; Warry, Robins, & Burges.*

T. W. G.

CHITTY, J.      HOWELL v. METROPOLITAN DISTRICT RAILWAY  
COMPANY.

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Nov. 9.

[1879 H. 51.]

*Vendor and Purchaser—Railway Company—Verdict of Jury—Statutory Contract—Specific Performance—Purchase-money—Garnishee Order—"Debt due or accruing in hands of Garnishee"—Conditional Debt—Lands Clauses Consolidation Act, 1845, ss. 49, 50—Rules of Court, 1875, Order XLV., rr. 3, 8.*

26 ChD 461  
23 ChD 294

A "debt due or accruing" to a judgment debtor and therefore capable of being attached by a garnishee order under Rules of Court, 1875, Order XLV., r. 3, must be an absolute and not merely a conditional debt.

Thus, where, after notice to treat by a railway company to a landowner, the purchase-money has been fixed by the verdict of a jury and judgment of the sheriff under sects. 49 and 50 of the *Lands Clauses Act*, the purchase-money cannot be attached by a garnishee order *nisi* served upon the company by a judgment creditor of the landowner after the verdict but before the execution or tender of a conveyance; for the proceedings under the above sections do not of themselves create an absolute debt due from the company to the landowner, his right to the purchase-money being conditional upon the execution or tender of a conveyance.

Accordingly, in a case where the landowner had brought an action and obtained judgment against the company for specific performance of the statutory contract:—

*Held*, that the purchase-money could not be attached by garnishee orders *nisi* served upon the company, some before and others after the commencement of the action, notwithstanding that a good title had been shewn; nor even by a garnishee order served after the execution of the conveyance when the money had been paid into Court by the company under the judgment, the money not being "a debt in the hands" of the garnishee within rule 3 of Order XLV.

The provisions of rule 8 of Order XLV., as to payment or execution being a valid discharge to the garnishee, are inapplicable to a debt due from the judgment debtor that is conditional only.

## ADJOURNED SUMMONS.

In August, 1878, the Defendants, the *Metropolitan District Railway Company*, served the Plaintiff with the usual notice to treat in respect of a leasehold house at *Fulham* belonging to him, and known as "*Chaldon House*," and on the 1st of October, 1878, they took possession under the 85th section of the *Lands Clauses Act*.

On the 27th of November, 1878, the purchase-money or com-

pensation for the property was fixed by a jury under that Act in the usual way at the sum of £3650, and on the same day the sheriff gave judgment for that amount.

The company having delayed the completion of their purchase, the Plaintiff, on the 25th of January, 1879, brought this action for specific performance of the statutory contract, and on the 8th of May, 1879, obtained judgment accordingly, subject to the usual inquiries as to title.

By his certificate, dated the 7th of January, 1880, the Chief Clerk certified that a good title to the property could be made, subject to the several mortgages, charges, garnishee orders, and judgments mentioned in the schedules to the certificate; also that such good title, subject as aforesaid, was first shewn on the 4th of December, 1878, before the commencement of the action.

The incumbrances mentioned in the certificate included several garnishee orders *nisi* which had been obtained and served on the company by judgment creditors of the Plaintiff. Of these garnishee orders two had been served after the verdict of the jury but before good title shewn; three others after good title shewn but before writ issued; thirteen others after writ issued but before judgment; and two others after judgment but before the date of the certificate.

The garnishee orders were in the usual form, attaching "all debts owing or accruing from the garnishee to the judgment debtor."

On the 9th of February, 1880, an order was made on further consideration directing a conveyance and payment by the company of their purchase-money into Court within fourteen days after conveyance, such purchase-money not to be paid out without notice to the several incumbrancers, naming them. Thereupon, on the 28th of June, 1880, the Plaintiff executed an assignment of the property to the company, who shortly afterwards paid the purchase-money into Court.

Another garnishee order *nisi* was served subsequently to the date of the assignment and the payment of the purchase-money into Court.

Several applications being made in Chambers by holders of garnishee orders and other incumbrancers for payment of their

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CHITTY, J. claims out of the fund in Court, and the fund being insufficient for payment of the whole of the charges in full, the question arose whether, under Rules of Court, 1875, Order XLV., rule 3, the purchase-money constituted a "debt due or accruing to the judgment debtor," and attachable as such under the garnishee orders.

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The question was raised by a summons by Messrs. *Allingham*, who held charges by way of mortgage on the house subsequent in date to some of the earlier garnishee orders, asking for payment of their mortgage debts out of the fund in Court.

Phipson Beale, for the summons:—

I submit that the fund does not constitute a "debt due or accruing" within the meaning of the garnishee orders *nisi*, or Order XLV., rule 3, which is in the same terms as sect. 62 of the *Common Law Procedure Act*, 1854. Neither is there a debt "in the hands" of the garnishee within the meaning of the rule. Not only do the garnishee orders served before the date of my securities not take priority of my debt, but they do not create any charge at all. A garnishee order only affects a debt then actually due, not a debt which may become due at a future time. The purchase-money in Court was not a debt actually due or accruing when these garnishee orders which are prior in date to me were obtained: it could not become a debt until, at all events, the execution of the conveyance. In *Guardians of East London Union v. Metropolitan Railway Company* (1) it was held that where, after notice to treat by a railway company, the purchase-money has been fixed by an award under the *Lands Clauses Act*—which is equivalent to the verdict of a jury, as in the present case—an action for the purchase-money cannot be maintained until the execution of the conveyance, on the ground laid down in *Laird v. Pim* (2), that no actual debt exists until the execution of the conveyance. *Richardson v. Elmit* (3), *Hall v. Pritchett* (4), *Stevens v. Phelps* (5), and *Chatterton v. Watney* (6)—are also authorities that, to entitle a judgment creditor who has obtained

(1) Law Rep. 4 Ex. 309.

(2) 7 M. & W. 474.

(3) 2 C. P. D. 9.

(4) 3 Q. B. D. 215.

(5) Law Rep. 10 Ch. 417.

(6) 16 Ch. D. 378; 17 Ch. D. 259.

a garnishee order to the benefit of the rule, there must be a debt then perfected, that is, actually due, although it may be payable only *in futuro*. CHITTY, J.

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Grosvenor Woods, for a mortgagee subsequent in date to the judgment in the action, and therefore also subsequent in date to most of the garnishee orders:—

It is clear that moneys paid into Court, and therefore not being “in the hands” of the garnishee, cannot be attached under a garnishee order: *Dolphin v. Layton* (1). It will probably be contended that under the statutory contract the relation of trustee and *cestui que trust* was established, and that the purchase-money has thus become in equity the property of the Plaintiff, the vendor: but that is not so. The relation of trustee and *cestui que trust* does not actually subsist between vendor and purchaser while the contract is *in fieri*, for it is uncertain whether the contract will or will not be performed: the relationship is completed only when the contract is performed by actual conveyance: *Trotter v. Watson* (2); *Lysaght v. Edwards* (3); *Rayner v. Preston* (4). I therefore submit that as yet there has been no time when this purchase-money could be attached as a debt due to the Plaintiff.

Godefroi, for other mortgagees subsequent in date to a garnishee order, took the same view.

Andrew J. Leach, for another incumbrancer.

Northmore Lawrence, for the holders of the garnishee orders:—

The question is, did this money ever become attachable as a debt, and, if so, when? The principal authorities that have been cited are Common Law cases, but I submit that the present case should be governed by the doctrines of Equity applicable to the relation of vendor and purchaser. The moment there is a valid contract subsisting between a vendor and purchaser, as there was here, the purchase-money having been fixed by the verdict of the jury and judgment of the sheriff, the relation of debtor and creditor commences, and there is an equitable debt due from the

(1) 4 C. P. D. 130.

(3) 2 Ch. D. 499.

(2) Law Rep. 4 C. P. 434, 451.

(4) 18 Ch. D. 1, 13.

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purchaser to the vendor, and one that is capable of being attached. That the relation of debtor and creditor commences at the moment of the contract may, I submit, be inferred from the judgment of the Master of the Rolls in *Lysaght v. Edwards* (1), where he says that the vendor then becomes a trustee for the purchaser of the estate sold, with "a right to the purchase-money" and a charge or lien on the estate for the security of that purchase-money. And in *In re Eccleshill Local Board* (2), Vice-Chancellor Bacon distinctly states it as his opinion that when the purchase-money is fixed by the verdict of a jury and judgment of the sheriff, the purchasers become "plainly debtors from that moment to the vendors," and that "the right to the unpaid purchase-money is clear from that day when the amount for the first time was conclusively ascertained." Or, at all events, the relation of debtor and creditor subsisted from the moment a good title was shewn: *In re Pigott and the Great Western Railway Company* (3); though in that case there was an award, not the verdict of a jury, and it is therefore distinguishable from *In re Eccleshill Local Board*. Then, there being a debt due from the purchaser to the vendor, it is capable of attachment under Rules of Court, 1875, Order XLV.: *In re Cowans' Estate* (4); and it is not necessary to wait till the debt is actually payable before making an order for payment: *Tapp v. Jones* (5). The mere fact that untenable defences have been set up by the purchaser does not the less make the purchase-money a debt. It is true that at law a vendor must execute or tender a conveyance before he can sue for his purchase-money, on the ground stated in *Guardians of East London Union v. Metropolitan Railway Company* (6), following *Laird v. Pim* (7), that before requiring payment of the price of anything sold the property in the thing must be transferred; the remedy, until transfer, being only in damages for breach of contract. But in equity you can bring an action for performance of the contract and payment of the purchase-money. Here the right to the purchase-money was, according to *In re Eccleshill Local Board* (8), established by the

(1) 2 Ch. D. 499, 506.

(2) 13 Ch. D. 365, 368, 369.

(3) 18 Ch. D. 146.

(4) 14 Ch. D. 638.

(5) Law Rep. 10 Q. B. 591.

(6) Ibid. 4 Ex. 309.

(7) 7 M. & W. 474.

(8) 13 Ch. D. 365.

verdict of the jury, and the action for specific performance only enforced the right previously existing: it did not create the right: *In re Pigott and the Great Western Railway Company* (1). Where there is a clear case for specific performance, as we have here, the practice has always been to treat the purchase-money as an equitable debt, for the Court will grant a writ of *ne exeat regno* in respect of it, a writ which will not be granted except where there is an actual debt: *Raynes v. Wyse* (2); *Morris v. McNeil* (3); *Boehm v. Wood* (4); *Seton on Decrees* (5).

With regard to the cases cited on the other side. In *Richardson v. Elmit* (6) there was a mere notice to treat upon which nothing had been done, which is not the case here. *Hall v. Pritchett* (7) was a totally different case—the future salary of a medical officer, which the Court, following *Jones v. Thompson* (8), held not to be attachable because it had not yet been fully earned. *Stevens v. Phelps* (9) was an administration action in which a decree had been made before the garnishee order was obtained. In *Chatterton v. Watney* (10) the garnishee order was obtained before a sale of the property and before any contract which would have the effect of conversion; whereas in the present case all the garnishee orders were obtained after the contract. At all events the garnishee order which was obtained subsequently to the conveyance is effectual.

Phipson Beale, in reply:—

An unpaid vendor is not an absolute trustee for the purchaser: he is a trustee in a qualified sense only, the relation of trustee and *cestui que trust* not being perfected until the contract is completed by conveyance: *Rayner v. Preston* (11). We have a distinct charge on the land, which can only be displaced, if at all, by another charge equivalent to it; and it is clear that the fund, being in Court, and not in the hands of the garnishee, cannot be attached: *Dolphin v. Layton* (12).

(1) 18 Ch. D. 146, 153.

(2) 2 Mer. 472.

(3) 2 Russ. 604.

(4) 1 T. & R. 332.

(5) 4th Ed. p. 316.

(6) 2 C. P. D. 9.

(7) 3 Q. B. D. 215.

(8) E. B. & E. 63.

(9) Law Rep. 10 Ch. 417.

(10) 16 Ch. D. 378; 17 Ch. D. 259.

(11) 18 Ch. D. 1.

(12) 4 C. P. D. 130.

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CHITTY, J. CHITTY, J.:—

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This case has been argued very elaborately and with considerable ability, and Mr. *Lawrence* has, I have no doubt, produced all the authorities that can be found bearing upon it. The question is whether these garnishee orders *nisi* do or do not affect the fund now in Court. The question turns upon the meaning of Order XLV. (Rules of Court, 1875), especially of rule 3, which says that "Service of an order that debts due or accruing to the judgment-debtor shall be attached, or notice thereof to the garnishee, in such manner as the Court or Judge shall direct, shall bind such debts in his hands." The debts capable of being attached under that rule must be, as I understand it, according to the authorities, debts "due or accruing" and also debts "in the hands" of the garnishee.

The facts of the case, so far as it is necessary to mention them, are as follows: The *Metropolitan District Railway Company* were entitled to take a leasehold house belonging to Mr. *Howell*, the Plaintiff, and the usual notice to treat was given. On the 27th of November, 1878, the compensation money for the property was ascertained by the verdict of a jury and judgment given for £3650. After that two garnishee orders *nisi* were obtained and served upon the company. Stopping there for a moment, the first argument on behalf of the garnishees was that, immediately after the verdict and judgment for £3650, that money became a debt due to the Plaintiff and attachable as such under the rule I have just read. But that is not so. The 49th and 50th sections of the *Lands Clauses Act*, the sections under which the amount of purchase-money and compensation is fixed by a jury and the judgment of the sheriff, do not have the effect of creating an absolute debt due from the company to the landowner: they are merely part of the machinery provided by the Act for ascertaining the purchase-money; and, in my opinion, I should be misreading those sections and giving a wrong effect to them if I were to hold that, immediately the £3650 was found to be the sum payable to the Plaintiff, a debt from the company to him was established. In one of the cases cited to me, *Guardians of East London Union v. Metropolitan Railway Company* (1), it was decided that, where

(1) Law Rep. 4 Ex. 309.

there is an award under the *Lands Clauses Act*, the landowner cannot before conveyance sue the company at law for the amount fixed by the award; and I can see no distinction in principle where the amount has been fixed by a verdict, as in the present instance.

It appears to me, therefore, that this purchase or compensation money did not constitute a debt payable or accruing immediately the verdict and judgment were obtained, for the Plaintiff was not entitled to the money, either at law or in equity, except on executing or tendering a conveyance to the company; and I so hold.

Then the next question is, did the issue of the writ or the obtaining of the judgment in this action confer upon any of the holders of garnishee orders any further right to this money? In my opinion no distinction can be made for this purpose between the issue of the writ and the obtaining of the judgment. The judgment was obtained on the 8th of May, 1879: it was a judgment of the ordinary kind in cases of this description—an ordinary judgment for specific performance. Then it was certified in the action, upon an inquiry directed by the judgment, that a good title had been shewn on the 4th of December, 1878; but even upon judgment, a good title having been shewn, the purchase-money did not become a debt payable to the Plaintiff. It appears to me that, though in one sense there may have been an equitable debt due to the vendor, there was not such a debt as could be attached. The purchase-money was not a debt actually “due or accruing” within the meaning of the garnishee orders, for the right to it was conditional upon the execution or tender of a conveyance by the vendor.

The provisions of the 8th rule of Order XLV. as to payment or execution being a valid discharge to the garnishee are inapplicable to a conditional debt. To hold that the purchase-money was bound by the garnishee orders would be, in effect, to deprive the purchasers of their right to withhold payment of their purchase-money until they got their conveyance.

Then we come to the order on further consideration. With regard to the garnishee order obtained after that date, it is clear from the authorities that it could not affect the fund that was already in Court, even though there had been a conveyance; for

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Lordship that he did not desire to have the summons reheard, so as to enable the Plaintiffs to go direct to the Court of Appeal; or, in the alternative, that the order might be discharged.

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Cyril Dodd, for the Plaintiffs, now applied for the certificate, in order that the case might go direct to the Court of Appeal: *Dickson v. Harrison* (1); *In re Elsom* (2); *Northampton Coal, Iron, and Waggon Company v. Midland Waggon Company* (3).

Decimus Sturges, for the Defendants, did not oppose the application.

CHITTY, J., said that he intended to follow the practice which had been adopted by the Master of the Rolls, and always to adjourn summonses into Court for argument or judgment in cases in which an appeal was desired. Where there was no such adjournment the proper course was to move to set aside the order made in Chambers, so that the Judge might have the opportunity of delivering a judgment which would enable the Court of Appeal to understand the reasons for his decision.

Under the special circumstances of the case his Lordship directed the motion to discharge the order to be put in the paper for hearing on the 10th instant.

Solicitors: *Goldberg & Langdon*, agents for *A. J. O'Connor, Birmingham*; *Kingsford, Dorman, & Co.*, agents for *Price & Son, Birmingham*.

(1) 5 Ch. D. 243.

(2) 6 Ch. D. 346.

(3) 7 Ch. D. 500.

G. I. F. C.

CHITTY, J.

FOSTER v. ELSLEY.

1881

Dec. 13.

[1881 F. 1764.]

Will—Solicitor—Trust Estate—Trustees.

A direction in a will appointing a particular person solicitor to the trust estate imposes no trust or duty on the trustees of the will to continue such person their solicitor in the management and affairs of the estate.

GEORGE MAY UPFIELD, by his will, dated the 31st of October, 1879, after appointing the Defendants his executors and trustees, devised and bequeathed to them all his real and personal estate upon the trusts therein set forth, and the will contained the following clause: "And I declare that my solicitor, *William Edward Foster*" (the Plaintiff), "shall be the solicitor to my estate and to my said trustees in the management and carrying out the provisions of this my will."

The testator died on the 3rd of November, 1879, and his will was subsequently proved by the Defendants, who, in pursuance of the directions contained in the will, employed the Plaintiff as their solicitor in the management of the trust estate up to the 13th of October, 1881, when he received a letter from certain solicitors at *Oldham* stating that they were instructed by the Defendants to ask for the immediate delivery of all deeds, documents, and securities in his possession relating to the estate of the testator, and also an account of costs due to the Plaintiff, and also for an appointment for them to attend at the Plaintiff's office and pay such costs, and receive the documents.

This was a motion by the Plaintiff to restrain the Defendants from employing any person other than the Plaintiff as solicitor to the estate of the testator, or in any business relating to the management or carrying out of the provisions of his will.

Dundas Gardiner, in support of the motion:—

The testator has thought fit to appoint Mr. *Foster* solicitor to his estate and to his trustees, and they cannot, I submit, arbitrarily remove him from the office, nothing being charged against

him in the discharge of his duties. I rely upon *Williams v. CHITTY, J. Corbet* (1) and *Hibbert v. Hibbert* (2).

Ince, Q.C., and *Hamilton Humphreys*, for the Defendants, were not called upon, but referred to *Shaw v. Lawless* (3), and *Finden v. Stephens* (4).

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CHITTY, J. :—

The testator in this case has inserted a clause in his will that “my solicitor, *W. E. Foster*, shall be the solicitor to my estate and to my said trustees in the management and carrying out the provisions of this my will,” and this motion is founded on the proposition that this clause imposes on his trustees the duty of employing this gentleman (the Plaintiff) as their solicitor. In *Finden v. Stephens*, to which I have been referred, the direction was that a certain person should be employed as agent and manager of the testator’s estates whenever his trustees should have occasion for the services of a person in that capacity, and it was held that the direction did not create a trust which such person could enforce. The case of *Shaw v. Lawless* in the House of Lords had previously decided the question. I am told that no case is to be found in the books like the one before me where a testator has appointed a particular person as solicitor to his estate, but in analogy to the cases to which I have referred I decide that the direction in this will imposes no trust or duty on the trustees to continue the Plaintiff as their solicitor, and that being my decision I refuse this motion with costs.

Solicitors: *Swann & Co. ; Johnson & Weatheralls.*

(1) 8 Sim. 349.

(2) 3 Mer. 681.

(3) 5 Cl. & F. 129.

(4) 2 Ph. 142.

G. M.

C. A.
 1881
 V.-C. H.
 Feb. 1, 2.
 C. A.
 Nov. 18.

In re ROBERTS.
 REPINGTON *v.* ROBERTS-GAWEN.

[1880 R. 1096.]

Will—Construction—Remoteness—Gift to Descendants bearing a particular Name—Life Estate to Unborn Persons.

The testatrix, Miss *R.*, had a brother, a widower advanced in life, who had assumed the name of *R. G.*, and had two children, one a bachelor of unsound mind, the other a daughter. By her will she bequeathed a fund to trustees in trust to pay the income to her brother for life, then to his son for life, and from and after the decease of both of them, upon trust to pay the income "for life unto any immediate or direct descendants of my said brother or nephew who shall bear the name of *R. G.* only, and from and after his or her decease, or in case of failure of any such immediate or direct descendant of my said brother or nephew who shall bear the name of *R. G.* only," upon trust for certain specified charitable societies. There was a clause for determining the interests of any descendants who after becoming entitled to the receipt of the income should abandon the name of *R. G.* Before the death of the nephew, a son born after the death of the testatrix, of the daughter of the testatrix's brother, assumed by royal license the name of *R. G.*, and at the decease of the survivor of the brother and nephew there was no other descendant of either of them who bore that name:—

Held, by *Hall*, V.C., that the trusts subsequent to the life interests of the brother and nephew were void for remoteness, and that on the determination of those interests the fund fell into the residue.

Held, on appeal, that the limitations after the life interests were not void for remoteness:

Held, that the limitation to descendants was a gift for life to descendants living at the determination of the life interests and bearing the name of *R. G.* as joint tenants:

Held, that the gift was not, as in *Leigh v. Leigh* (1), confined to persons entitled to the name of *R. G.* by birth, and that the brother's grandson, as he bore the name of *R. G.* at the determination of the life interests, was entitled for life, and that on his decease the gift to the charities would take effect.

MISS ROBERTS, by will, dated the 21st of August, 1851, bequeathed a sum of £8750 £3 5s. Bank Annuities to trustees upon trust for her brother, Admiral *J. C. G. Roberts-Gawen*, during his life, and after his death for his son *A. J. Roberts-Gawen* during his life, "And from and after the decease of both of them my

(1) 15 Ves. 92.

said brother and nephew, then upon trust to pay the dividends and annual proceeds thereof for life unto any immediate or direct descendants of my said brother or nephew who shall bear the name of *Roberts-Gawen* only, and from and after his or her decease, or in case of failure of any such immediate or direct descendant of my said brother or nephew who shall bear the name of *Roberts-Gawen* only, then I direct my trustees or trustee for the time being to stand possessed of my said residuary personal estate, upon trust to pay and divide the said sum of £8750 £3 5s. per Cent. Reduced Bank Annuities unto and amongst the several charities, and in the proportions hereinafter mentioned (that is to say),” £2000 to the *Salisbury Infirmary*; £2000 to the *Society for Promoting Christian Knowledge*; £1000 to the *Bath United Hospital*; £1100 to the *Bath National Schools*; £1000 to the *Curate Fund Society*; £1100 to the *Church Building Society*; and £550 to the *Asylum for the Indigent Blind*, “to which said several charities I bequeath the said several legacies accordingly to the treasurers of the said several institutions in aid of the funds thereof respectively. Provided always and I do hereby declare that if either of them my said brother and nephew and their descendants as aforesaid shall, after they have become entitled to or shall be in the actual receipt of the dividends and annual proceeds of the said trust moneys, abandon the name of *Roberts-Gawen* and take or assume any other name, the trusts in favour of my said brother and nephew and their descendants as aforesaid under this my will shall immediately cease, determine, and be void to all intents and purposes.” The testatrix then bequeathed her residuary estate to her said brother absolutely.

The testatrix died in 1853. Her brother, Admiral *Roberts-Gawen*, who had assumed that name, was at that time a widower with two children only, viz., the son named in the will, who was a bachelor of unsound mind, though not found so by inquisition, and a daughter, who had married *J. C. B. Borough*, by whom she afterwards had several children. Admiral *Roberts-Gawen* never married again. By his will, dated the 5th of April, 1869, after reciting the bequest in the will of Miss *Roberts*, he stated it to be his wish that his grandson *C. G. Borough* should immediately after his decease, or so soon as circumstances would admit, assume in

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addition to his own name that of *Roberts-Gawen*, so that in case of failure of issue of the testator's son *A. J. Roberts-Gawen*, the grandson might benefit by the bequest in Miss *Roberts's* will.

Admiral *Roberts-Gawen* died in 1874, and in May, 1875, *C. G. Borough* assumed by royal license the name of *Roberts-Gawen*. *A. J. Roberts-Gawen* died a bachelor in 1880.

The Plaintiffs were trustees of the settlement made on the marriage of Mrs. *Borough*, which, in the events which had happened, included all the residuary estate of Admiral *Roberts-Gawen*, and they commenced this action to have the trusts of the fund administered. The facts were submitted to the Court by special case. The fund was now represented by £7800 New £3 Per Cent. Annuities.

The action came on for hearing before Vice-Chancellor *Hall* on the 1st of February, 1881.

Hastings, Q.C., and *Speed*, for the Plaintiffs:—

We contend that the gift after the limitations to the testatrix's brother and nephew are void for uncertainty and remoteness. As regards remoteness, there is a limitation of a perpetual succession of life interests as long as there are any descendants of the brother or nephew, so that the fund may not vest during a life or lives in being and twenty-one years afterwards: *Tollemache v. Coventry* (1); *Jarman on Wills* (2); *Lewis on Perpetuities* (3). It is also void upon the ground that it is uncertain what the expression "any immediate or direct descendant" means, and whether there would be within the prescribed limit of time any descendant who should bear the name. And if the gift is void on either of those grounds, the gift over to the charities fails also: *Proctor v. Bishop of Bath and Wells* (4); *Lewis on Perpetuities* (5).

W. Pearson, Q.C., and *Marcy*, for the Defendant *Charles Gawen Roberts-Gawen*.

Renshaw, for the executors of the will of Admiral *Roberts-Gawen*.

(1) 2 Cl. & F. 611; 8 Bli. (N.S.) 547.

(2) 4th Ed. pp. 258, 276.

(3) Pages 476, 478.

(4) 2 H. Bl. 358.

(5) Page 465.

Eddis, Q.C., and *Cadman Jones*, for the charities :—

This is a good gift upon the determination of the prior life estates of the brother and nephew to a descendant then in existence bearing a particular name. It is not within *Tollemache v. Coventry* (1), but within the principles laid down in *Stuart v. Cockerell* (2) and *Evans v. Walker* (3), *i.e.*, that “property may be given by will to several unborn persons successively for life with remainders over provided the vesting of the remainders be not postponed till after the death of such unborn person or persons.” But no person can take under the gift unless he bears the name of *Roberts-Gawen* at birth, and it is not enough for him to assume it : *Barlow v. Bateman* (4) ; *Pyot v. Pyot* (5) ; *Leigh v. Leigh* (6) ; *Carpenter v. Bott* (7). There has, therefore, been a failure under a valid gift, and the gift over to the charities takes effect.

HALL, V.C. :—

It is extremely difficult to say what was the meaning and intention of this testatrix in framing this very singular will, and very difficult to determine whether she intended a single enjoyment, a collective enjoyment, or a successive enjoyment on the part of the persons who are to take under this disposition.

The fact that she has mentioned “descendants” in the first part of the disposition seems to tend to the conclusion that several persons were intended to take in some way under it, either together or successively ; but, on the other hand, it is urged that though the testatrix uses the expression “any immediate or direct descendants,” she may have meant only such one descendant ; because the expression “his or her” decease which she afterwards uses points to one person only out of those who answer the description of descendants ; and it may fairly be said that the words “his or her” are not consistent with two persons taking together, but point to a single enjoyment. The clause of forfeiture again speaks of “their descendants ;” but to my mind that

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(2) Law Rep. 7 Eq. 363 ; S. C. on appeal, Law Rep. 5 Ch. 713. (5) 1 Ves. Sen. 335.

(3) 3 Ch. D. 211. (6) 15 Ves. 92.

(7) 15 Sim. 606.

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rather indicates that there was to be a forfeiture if any of the persons there specified, that is, her "said brother and nephew and their descendants" should change his name, and points to a possibility of one of a series among descendants being a taker. It would certainly be a strange thing to say that several descendants were intended to take collectively, but that they should all forfeit if any one of those collective takers abandoned the name. Yet such apparently would be the result if they were all to take together. The character of the disposition is this. The testatrix first takes her brother and then her nephew *Augustus* (without putting in any of his brothers along with him) as successive tenants for life, and she then goes on to "any immediate or direct descendants of my said brother or nephew," so that if the argument that the parties were to take together is to prevail, another son, if there were one, of the testatrix's brother might come in and take conjointly with a child of her nephew, which would be a most unheard-of and absurd provision and course of limitation.

The difficulty of determining the true construction of these dispositions favours the conclusion that upon the whole this is a case in which the limitations were not intended to be confined to one particular taker, but were intended to include a series of persons taking as "descendants" in the ordinary sense of the word, that is to say, singly and separately and successively according to the ordinary mode of limitation or descent of a landed property. All these are however questions of immense difficulty, so that I am not at all sure, notwithstanding my disinclination to hold the gift void for uncertainty, that such might not be the true result in this particular case.

But, assuming that the gift is not void for uncertainty, it is said that the limitation can be supported in favour of the Defendant *Charles Roberts-Gawen*, as being a person answering the description contained in the gift. The answer made to that is, first, that this cannot be so, because under the terms of the gift, whether it is to an individual or to more than one, the person or persons intended to take will not necessarily be ascertained within the period required by law; and *Tollemache v. Coventry* (1) was referred to as an authority upon that point. Now *Tollemache v. Coventry*

(1) 2 Cl. & F. 611; 8 Bli. (N.S.) 547.

is a decision of the House of Lords, and, notwithstanding the strictures and explanations, or attempted explanations, with reference to that case which we find in the very learned work of Lord *St. Leonards* on Real Property, and whatever may be thought of the decision as applied to the particular facts of that case, the present case does seem to me to come within what Lord *St. Leonards* terms the doctrine of that case. But whether it does so or not, and whether or not this disposition is to be treated as one in favour of several persons collectively or successively, or in favour of one particular individual only, the case seems to me to be covered either by *Ker v. Lord Dungannon* (1) or by *Boughton v. Boughton* (2). These authorities seem to me to shew that this gift cannot be supported by reason of the uncertainty as to whether there would be a person having the required name so as to answer the description within the prescribed limit of time. Next it is said that whether this be so or not the gift is altogether void upon a separate ground, which is, that the intention of this testatrix was only to make dispositions in favour of persons who had the name of *Roberts-Gawen* independently of assumption, and therefore that the present claimant, who has assumed the name, is altogether outside the disposition. I think, however, as I have already intimated during the course of the arguments, that this is not a sound construction of this particular will. Looking at the state of the family at the time when the will was made, and considering that *Roberts-Gawen* was not the family name either of the testatrix or her brother, or even of his son (unless it can be considered to be the son's family name by reason of his being the son of a man who had assumed that name), it appears to me that the expression "who shall bear the name of *Roberts-Gawen* only," is meant to indicate and describe any person who bore that name, whether by reason of its being his name by birth or by assumption; I therefore hold that argument not to be correct.

Assuming that to be so, it is quite plain that the charities cannot take under the gift over, because they can only take either, first, from and after the decease of some one, until whose death

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(1) 1 D. & War. 509; 12 Cl. & F. (2) 1 Coll. C. C. 26; on appeal, 546; *nom. Lord Dungannon v. Smith.* 1 H. L. C. 406.

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they must wait, and who cannot himself take as not being ascertained within the required limit of time, or, secondly, on a failure of certain persons who have not failed, although they cannot take. If, in point of construction, the alternative disposition had been framed in such a way as to express that the gift over was to take effect in case of there being a failure of the preceding disposition from any cause whatever, including either the invalidity of the previous gift or the incapacity of any person to take under it, there might have been something to be said in favour of the contention on behalf of the charities. But the event has not happened on which alone this ulterior disposition was to take effect.

The case is not like *Monypenny v. Dering* (1), in which there was an alternative gift expressed to take effect in case there should be a failure of persons to take, or in case no person should come into existence who could take. There are no words here which will include that, nor any words which as a matter of construction can be said to express that, as there were in *Doe v. Challis* (2).

It therefore appears to me that the claim of the charities under the gift over fails on every ground, and that the claim of the first Defendant, *Charles G. Roberts-Gawen*, fails also. The result is that the £7800 New £3 per Cents passed, subject to the life interests of Admiral *Roberts-Gawen* and his son therein, under the residuary gift in the will of the testatrix, to her brother Admiral *Gawen*, and subsequently under the residuary gift in the admiral's will.

W. W. K.

C. A.      The Charities appealed. The appeal was heard on the 18th of November, 1881.

*Eddis*, Q.C., *Davey*, Q.C., and *Cadman Jones*, for the appeal:—

We submit that the gift is to a class of descendants bearing the name of *Roberts-Gawen*, as joint tenants for life, and that if there are none when the life estates to the brother and nephew determine, then the gift to the charities takes effect; and that if there are any, that gift takes effect on the death of the last sur-

(1) 2 D. M. & G. 145.

(2) 18 Q. B. 231; 7 H. L. C. 531.



vivor of them. The expression "his or her" is not very accurate, but is explained by the joint tenancy, since in the case of joint tenancy the gift over must take effect on the death of one person. The words "from and after" shew that the gift is to a class who take on the determination of the life estates. There is nothing from which the successive life estates which the Vice-Chancellor supposes to have been limited can be inferred. There is no such expression as "descendants for the time being."

[JESSEL, M.R.:—What words do you find to confine the descendants to those living at the death of the surviving tenant for life?

BAGGALLAY, L.J.:—The gift over throws light on the question who were to take under the first alternative.]

The gift must be confined to those who come into *esse* before the determination of the tenancies for life, otherwise such a gift would be always void. No doubt if you have a gift of personalty to *A.* for life, remainder to the children of *B.*, and *B.* has no child at *A.*'s death, all the children of *B.*, whenever born, will take, for the class of children of *B.* is limited and must be capable of being ascertained during *B.*'s life; but the rule cannot be applied to descendants.

[JESSEL, M.R.:—There can be no doubt that under a gift of money to *A.* for life, then to *B.* for life, and then to the descendants of *A.* and *B.*, those descendants only can take who are capable of taking at the decease of the survivor of *A.* and *B.* This is a rule of convenience not depending on intention.]

It is enough if the rule has been adopted for convenience. In all the cases referred to by the Vice-Chancellor there were words expressive of succession, here there are none. The class then must be ascertained according to the ordinary rules of ascertaining a class, and no one can take unless he has become qualified to take before the determination of the life estates. If then *Charles Gawen Roberts-Gawen* is qualified he takes for life, and on his death the charities will take, the gift to them being a gift to ascertained bodies after a life estate to an unborn person, which is open to no objection on the ground of remoteness.

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We say, however, that the charities take at once, for that the assumption of the name of *Roberts-Gawen* is not enough to satisfy the will: a person in order to take must have that name by birth: *Barlow v. Bateman* (1); *Pyot v. Pyot* (2); *Leigh v. Leigh* (3). The testatrix speaks of abandoning the name, but there is not a word to shew that she contemplated any one's assuming it.

*Hastings*, Q.C., and *Speed*, for the trustees of Mrs. *Borough's* settlement:—

We say that the gift to the descendants is void for remoteness, and that the fund, subject to the life estates of the brother and nephew, fell into the residue. "Any" in the first gift means "every." There is a gift to every descendant, which can only be satisfied by a succession of life estates. The suggestion that a class are to take concurrently is inconsistent with the provisions as to forfeiture; if a number take concurrently it would be monstrous that the giving up the name by one should entail forfeiture on the whole class.

[JESSEL, M.R.:—The clause of forfeiture must be taken in a reasonable way and construed distributively, so that only those who drop the name lose their interest.]

The point of the case is whether the gift is to be confined to descendants living at the determination of the first life estates.

[JESSEL, M.R.:—How do you construe the gift over?]

As intended to take effect on failure of descendants at any time.

[BAGGALLAY, L.J.:—Is it a reasonable construction that the testatrix meant the ultimate gift to remain in suspense till it was ascertained at some remote time whether there would be any descendants answering the description?]

That is a more probable intention than that she should intend the property to go over to the charities while there were living

(1) 3 P. Wms. 65; 2 Bro. P. C. 272.

(2) 1 Ves. Sen. 335.

(3) 15 Ves. 92.

duly qualified descendants. As regards the assumption of the name the language of this will is different from that of the wills in the cases referred to, and there is no reason why "bearing the name" should be construed in any other than its natural sense, *i.e.*, as applying to any person who bears the name whether by descent or assumption.

*W. Pearson, Q.C., and Marcy, for Charles G. Roberts-Gawen, not having appealed, took no part in the argument.*

*Davey, in reply :—*

The gift to descendants is a gift to a class for their lives, and there are no words importing succession. The gift to descendants and the gift over on failure of descendants explain each other, and shew that there is a gift to a class of persons ascertained at the determination of the life estates of the brother and nephew, with a gift over if there are none then living.

JESSEL, M.R. :—

I entirely concur in the observation of the Vice-Chancellor that it is extremely difficult to determine the true construction and meaning of this singular will. It is one of the class of cases in which the persuasion of my own mind has always been that the testatrix had no particular intention as to the point in question, her mind not having been directed to it. In such a case, when we talk of the intention of a testator or testatrix, what we really mean is the fair interpretation to be given to the words used. There is some ground for the Vice-Chancellor's saying, "I am not at all sure, notwithstanding my disinclination to hold the gift void for uncertainty, that such might not be the true result in this particular case." But the modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty.

That being so, I have come to the conclusion on this will that the fair meaning of the words is to give the dividends, after the death of the brother and nephew, to a class for life. Now, if that

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is the fair meaning of the words, and it is the literal meaning of them, we have no right to import the word "successive" or the word "successively," or the words "for the time being," or anything of the sort. There is a gift to a class for life, with a gift over "from and after his or her decease." No doubt there is here a verbal difficulty, because "from and after his or her decease" has no immediate antecedent, the gift being to "immediate or direct descendants;" but if there is a number of the class, "his or her" may refer to the death of the survivor; if there is a single member of the class, then "his or her" refers to that single member. There is no real difficulty in the gift, reading it literally, and so reading it, it is a trust to pay for life to the immediate descendants who shall bear this name.

Such a gift, if there were nothing to confine it to objects living at a particular time, would be void for remoteness, for it might be 100 years before there was a descendant who bore the name. But a gift to a class of issue from and after the decease of a tenant for life is a gift to a class to be ascertained at that time, and the same rule must apply to a gift to a class of descendants; and there is an alternative gift on failure of the class, which most naturally means in case there shall be none such at the time of the death of the survivor of the brother and nephew. The Vice-Chancellor assumed that descendants afterwards coming into existence and bearing the name would take. It appears to me that on the literal construction of this will, the moment there is a failure the gift over takes place. There must at the death either be a class to take or no class to take. If there is a class to take, that is a class of persons living at the death of the survivor of the brother and nephew, and if there is at that time no class to take, then the gift over takes effect. If that is the real meaning of the will, then comes the question, Is the class to take more than for life? I see no reason why it should. The testatrix says the descendants shall take for life. We have then a class ascertained at the death of the survivor of the brother and nephew, and a gift to that class for life. Why should we carry it on further? I see no reason for attributing to the words a larger meaning than they naturally bear. The obvious meaning of the forfeiture clause is that those who abandon the name shall



forfeit their interests, and it furnishes no reason for modifying the effect of the gift to the class.

The only remaining point is a very curious one. There was a direct descendant of the brother living at the time of the death of the survivor of the brother and nephew who bore the name of *Roberts-Gawen*, but who was not born with that name, and the Appellant contends that we are not to take the expression "bear the name" in its literal sense, but treat it as denoting only persons acquiring the name by descent. I can see no reason for not reading it literally. The clause for forfeiture on abandoning the name tends strongly to shew that the testatrix, by the words "bear the name," meant "use the name." Looking at the state of the family, I think she meant this, because the name was not her family name, but one which her brother had assumed. Whether the nephew assumed it or was born after his father assumed it does not appear. There is no reason to suppose that the testatrix was not actuated by an attachment to the name itself, for she deprives everybody of any interest in the property who does not continue to bear that name. It seems to me, therefore, that when she used the term "shall bear the name," she meant what she said, and consequently that the Respondent *Charles Gawen Roberts-Gawen* is now entitled for life.

The result will be, in my opinion, that on his death the charities will be entitled. We cannot make a declaration in that form, but it will be involved in our discharging the Vice-Chancellor's order.

BAGGALLAY, L.J.:—

As the Vice-Chancellor has expressed an opinion upon the construction of the will different from that which I think should be adopted, and as the Master of the Rolls has expressed his opinion that the will is one of some difficulty of construction, I feel some hesitation in saying that I do not altogether sympathise with that view, as regards the difficulty of the construction of the will. Bearing in mind the state of the family of the testatrix at the time she made the will, and having regard to her intention, as that intention can be gathered within the four corners of the will, it appears to me to have been her intention that her brother and

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her brother's son should take this property in succession for their respective lives, and that upon the decease of the survivor of them, any descendants who might then be living of her brother who bore the name of *Roberts-Gawen* (whatever bearing the name might mean, which I will refer to presently) should take the income of this trust fund for life as joint tenants, and that upon the decease of the survivor of them the property should go over to the charities, and in like manner, if on the decease of the survivor of her brother and nephew there was no descendant who bore the name of *Roberts-Gawen*, the property was to go over immediately. This appears to me to have been the intention of the testatrix, as gathered from the language she has used, and there is nothing either in the language or in the surrounding circumstances whatever that causes me to entertain any doubt as to its being her true intention.

As regards the question to what the testatrix meant by "bear the name of *Roberts-Gawen*," I entirely agree with what the Master of the Rolls has said. I think it is essential that the descendant who was to take for life should bear the name at the time when the survivor of the brother and the nephew died, and the only descendant with whom we have to do took the name before the death of the testatrix's nephew. I think she used the expression bear the name in the common acceptance of the term, that is, she meant that descendants should be called and known by that name, and did not mean to require that they should be entitled to it by descent. That is supported by the fact that when she made her will her brother had no descendant of the name of *Roberts-Gawen*, except a lunatic son. True it is the brother was a widower, and might marry again, but he was of advanced age, and it is hardly to be supposed that the testatrix contemplated his marrying again, or contemplated the existence of descendants of his lunatic son.

LUSH, L.J.:—

I concur in the views expressed by the Court.

*Davey*:—

The Court, then, will declare the gift to the charities valid?

JESSEL, M.R. :—

If I could see any way to such a declaration, I should concur in making it, but I am afraid that it would be going too far in the way of declaring a future right.

*W. Pearson* :—

I submit that the only proper declaration is, that *Charles Gawen Roberts-Gawen* is entitled for life, if he so long bears the name of *Roberts-Gawen*. On his death, his issue, if he leaves any bearing the name, may dispute the point with the charities.

JESSEL, M.R. :—

Our decision involves this, that his issue cannot claim. If they could, the gift would be void for remoteness.

*Davey* :—

The Court can declare that the gift to descendants applies only to descendants living at the death of the survivor of the tenants for life named in the will, and that the trusts after those life estates are not void for remoteness.

JESSEL, M.R. :—

Yes. We may make a declaration that the gift after the life estates of the brother and nephew is not void for remoteness, since otherwise the fund would at once fall into the residue, and then there will be a declaration as to the class of descendants.

BAGGALLAY and LUSH, L.JJ., concurred.

Solicitors for the Charities : *Bridges, Sawtell, Heywood, Ram, & Dibdin*.

Solicitors for the other parties : *Tucker & Lake*.

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CURTIUS *v.* CALEDONIAN FIRE AND LIFE INSURANCE COMPANY.

[1880 C. 2752.]

*Practice—Parties—Assignment of Policy of Insurance—Absence of Personal Representative of Person insured—15 & 16 Vict. c. 86, s. 44.*

In an action by an equitable mortgagee of a policy of insurance against the insurance company for payment of the policy money the Court has jurisdiction under the 44th section of the 15 & 16 Vict. c. 86, to dispense with a legal personal representative of the assured where none exists.

In a case where the mortgage debt was larger than the policy money, and the estate of the assured was insolvent:—

*Held* (affirming the decision of the Master of the Rolls), that the jurisdiction to dispense with a personal representative was rightly exercised.

The *dicta* of *James and Cotton, L.JJ.*, in *Webster v. British Empire Mutual Life Assurance Company* (1) commented on.

THIS was an appeal from the decision of the Master of the Rolls.

In the year 1867 *A. L. Von Asten* effected a policy of insurance on his life with the *Caledonian Fire and Life Insurance Company* for £1500.

In February, 1879, he deposited the policy with the Plaintiff as security for a debt of £4626 due from him to the Plaintiff.

On the 4th of February, 1880, *Von Asten* died intestate, and, as the Plaintiff alleged in his statement of claim, insolvent. No administration had been taken out to his estate.

At the time of his death the whole of the sum of £4626 remained due to the Plaintiff, together with a considerable amount of interest. The amount payable on the policy was, including a bonus, £1541.

The company were ready and willing to pay the amount due, but were advised that they could not get a legal discharge in the absence of a legal personal representative of the intestate.

The Plaintiff then brought this action against the company to compel payment of the policy money.

It appeared from the evidence that the widow of the intestate



and his father, brothers, and sisters were unwilling to take out administration to his estate, and were willing that the policy moneys should be paid to the Plaintiff, and they disclaimed all interest in the moneys. It also appeared that his estate was insolvent, the only assets in *England* being the policy.

The Master of the Rolls held that under the 44th section of the *Chancery Improvement Act*, 1852 (15 & 16 Vict. c. 86), he could properly dispense with the presence of a legal personal representative, and ordered the company to pay the policy money, less their taxed costs of the action, to the Plaintiff.

The company appealed from this decision. The appeal was heard on the 7th of December, 1881.

*Westlake*, Q.C., and *W. B. Heath*, for the Appellants:—

We cannot safely pay the policy moneys in the absence of a personal representative of the intestate. *Crossley v. City of Glasgow Life Assurance Society* (1) is not a good authority since *Webster v. British Empire Mutual Life Assurance Company* (2). In that case the Master of the Rolls decided that the insurance company were justified in paying the money to the incumbrancer without the presence of a personal representative of the assured; but on the appeal from his judgment Lord Justice *Cotton* said (3): “In the present case it has not been questioned before us that the decree of the Court below gives a complete exoneration or discharge to the assurance office. It must not be assumed that we decide that that is so. That question is not before us, but it may hereafter arise.” And Lord Justice *James* (4) said: “I think it right to say as to what Lord Justice *Cotton* has said that I am a little surprised at the decree being made at all in the absence of the legal personal representative. I should have thought it very doubtful. It might be convenient to the assurance office, but I should hesitate before I dispensed with the legal personal representative in such a case.” The section was not meant to enable the Court to make such an order in every case, but only where the representative if present could not refuse to consent. The Court must see that there is a debt due to the Plaintiff equal

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(1) 4 Ch. D. 421.

(2) 15 Ch. D. 169.

(3) 15 Ch. D. 176.

(4) *Ibid.* 180.

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to the policy money ; and it cannot do this in the absence of the personal representative of the debtor : *Silver v. Stein* (1) ; *Bruiton v. Birch* (2) ; *Cox v. Stephens* (3) ; *Mortimer v. Mortimer* (4) ; *Rowlands v. Evans* (5) ; *Swallow v. Binns* (6) ; *Fowler v. Bayldon* (7) ; *Joint Stock Discount Company v. Brown* (8) ; *Long v. Storie* (9).

*Ince*, Q.C., and *F. G. Bagshawe*, for the Plaintiff, were not called on.

LORD COLERIDGE, C.J. :—

I am of opinion that the decision of the Master of the Rolls was right, and must be affirmed. The matter appears to me to fall directly within the terms of the 44th section of the Act referred to, which obviously contemplates the case of a person who is dead at the time of the suit being instituted. I cannot conceive a case more clearly within the terms of the section than one in which a person interested in a policy of insurance assigns it to another person and the company asks the protection of the Court in payment of the money. It is clear in the present case that the debt is largely in excess of the policy money ; the estate is insolvent, and the widow and the near relatives of the intestate have disclaimed all interest.

The question is really one of jurisdiction, for if it were only a question of discretion there is no doubt that the Master of the Rolls was justified in exercising it as he did. But it has been argued before us as a question of jurisdiction. I cannot see that any of the authorities shew that the Court had not a jurisdiction to make the order. No doubt some of the Judges have found fault with orders which have been made in particular cases, but although one Judge takes a different view from another on a particular case before them, that is a different thing from holding that there was no jurisdiction ; and I have had no authority cited shewing that the Court has no jurisdiction in such a case as the

(1) 1 Drew. 295.

(2) 22 L. J. (Ch.) 911.

(3) 11 W. R. 929.

(4) Ibid. 740.

(5) 33 Beav. 202.

(6) 9 Hare, App. xlvii.

(7) Ibid. App. lxxviii.

(8) Law Rep. 8 Eq. 376.

(9) Kay, App. xii.

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present. In *Rowlands v. Evans* (1), before Lord *Romilly*, it was very doubtful whether the Court had any jurisdiction, for the question whether there was any personal representative of the deceased party was being litigated in the Ecclesiastical Court. In *Webster v. British Empire Mutual Life Assurance Company* (2) no doubt Lord Justice *James* said that he was a little surprised at the decree having been made in the absence of the legal personal representative. But when the facts of that case are looked at they shew a good reason for that observation. There the amount of an insurance on the life of an insolvent had been handed over to an equitable mortgagee in the absence of a legal personal representative of the mortgagor, the sum payable on the policy being largely in excess of the mortgage debt. The effect was to pay to the creditor a large surplus which belonged to the insolvent's estate. I should in that case have felt the same doubt which Lord Justice *James* felt. Certainly Lord Justice *Cotton* went further, and appeared to doubt whether the order would give a complete discharge to the insurance company. I should have thought, if it had been necessary to decide the point, that the order would have given a complete discharge. At all events those observations of the learned Judges were only *dicta*, and do not throw any doubt on the jurisdiction of the Court in such a case as this. I am of opinion that there was jurisdiction in this case, and that it has been properly exercised.

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BAGGALLAY, L.J.:—

I am of the same opinion. The 44th section has conferred on the Court the power of dispensing with the presence of a legal personal representative in certain cases. The only restriction is that there must be no representative of the deceased person in existence. In other respects the power is perfectly general. Therefore what has been done was clearly within the jurisdiction. The Plaintiff was interested in the policy money, and there was no legal personal representative of the assured. No doubt a number of cases have been cited in which the Court has not thought fit either to proceed without a personal representative, or to appoint one; but they will all generally be found to be

(1) 33 Beav. 202.

(2) 15 Ch. D. 169.

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either cases in which proceedings have been actually pending for the appointment of a personal representative, or where duties would have had to be performed by the personal representative, if appointed. If there are other cases, they depend upon special circumstances.

In the present case it is admitted that the claim of the mortgagee is three times as much as the sum due from the company. The estate is insolvent, and all the near relatives of the intestate have disclaimed all interest. It is quite within the class of cases in which it is most desirable to avoid the necessity of taking out administration.

With respect to *Webster v. British Empire Mutual Life Assurance Company* (1), I agree with the Lord Chief Justice in his view of the case. The policy was much larger than the debt, and the estate was insolvent, therefore, the Court might well have come to the conclusion that the suit ought not to proceed without a personal representative of the intestate. I do not say that I should have come to that conclusion, but the circumstances explain the observations of the Lords Justices. There may have been facts before the Master of the Rolls in that case which justified him in deciding as he did, but which did not come before the Court of Appeal.

LINDLEY, L.J.:—

I am of the same opinion. It would be most inconvenient if orders like the present could not be made. How do the facts stand? The debt is much larger than the policy money; the estate of the intestate is insolvent; and it is no one's interest to take out letters of administration. I think there was ample jurisdiction to make the order, and that it was rightly exercised. The appeal must be therefore dismissed with costs.

Solicitors: *Ashurst, Morris, Crisp, & Co.; Van Sandau & Cumming.*

(1) 15 Ch. D. 169.

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[1880 H. 0354.]

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*Statute of Limitations—Mortgage—Foreclosure Action—Recovery of Land—  
Payment of Principal or Interest by Mortgagor or his Agent—3 & 4  
Will. 4, c. 27, ss. 2, 24, 40—1 Vict. c. 28.*

A foreclosure action is an action for the recovery of land, and is therefore not within sect. 40 of 3 & 4 Will. 4, c. 27, but is within sects. 2 and 24, and consequently within the supplementary enactment of 1 Vict. c. 28.

A payment to come within the 1 Vict. c. 28, must be a payment of principal or interest, and must be made by the mortgagor or some person bound to pay principal or interest on his behalf.

So the word "paid" in 3 & 4 Will. 4, c. 27, s. 40, involves by implication the addition of "by the person liable to pay."

A payment of rent made by a tenant of the mortgaged property to the mortgagee in consequence of a notice by the mortgagee requiring the rent to be paid to him is not such a payment.

The principle underlying all the Statutes of Limitations is that a payment to prevent the barring by statute must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom the payment is made.

Judgment of *Fry, J.*, reversed.

THIS was an appeal from a decision of Mr. Justice *Fry* (1).

The facts, which are stated fully in the previous report, were shortly as follows:—

On the 11th of October, 1849, *W. Ashberry* executed a mortgage of freehold and copyhold hereditaments to *W. Apsey* to secure the repayment of £500 and interest. In 1856 the mortgagee died having devised all estates vested in him on mortgage to the Plaintiffs, whom he appointed executors and trustees of his will. The interest fell into arrear, the last payment having been made by *Ashberry* in August, 1859. *Ashberry* died in 1877 having appointed the Defendant his executrix, and devised and bequeathed to her all his real and personal estate. On the 22nd of June, 1878, *Wade*, one of the tenants of the mortgaged premises, in consequence of a notice from the Plaintiffs that they claimed the estate, paid them £5 for half a year's rent.

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7 App Cas  
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He paid the next half year's rent to the Defendant, and gave up his holding to her. On the 21st of April, 1880, this action was commenced by the Plaintiffs claiming payment of the mortgage money and interest, and in default foreclosure. Mr. Justice *Fry* held that the payment by the tenant in 1878 was sufficient to bar the *Statute of Limitations*, and gave judgment for foreclosure in respect of all the mortgaged property.

The Defendant appealed.

*Kekewich*, Q.C., and *H. A. Giffard*, Q.C., for the Appellant:—

The question in this case is, whether the right to bring an action for foreclosure has been barred, or whether it has been kept alive by the payment to the mortgagees of £5 for rent by a tenant of part of the property comprised in the mortgage—whether such a payment was a payment of principal or interest within the meaning of 1 Vict. c. 28. Mr. Justice *Fry* has decided that it was, and has granted a decree of foreclosure over the whole mortgaged property. But that payment was not a payment of principal or interest within that enactment. A foreclosure action, though according to *Heath v. Pugh* (1) an action for the recovery of land, is none the less, when framed as this claim is, an action to recover money, that is, to realise the security.

[JESSEL, M.R.:—We are bound by the decision of *Heath v. Pugh* to hold that a foreclosure action is an action for recovery of land.]

Assuming it to be so, a payment of rent by a tenant is not a payment within 1 Vict. c. 28, to keep alive the mortgagee's right. To be such a payment it must be a payment of principal or interest, and a payment of rent is not a payment of interest: *Cockburn v. Edwards* (2). Mr. Justice *Fry* was much pressed by the *dictum* of the Vice-Chancellor in *Brocklehurst v. Jessop* (3), but that *dictum* was commented upon unfavourably by Vice-Chancellor *Turner* in *Fordham v. Wallis* (4), and has been expressly overruled by the Court of Appeal in *Cockburn v. Edwards*.

Then the payment to be within that section must be a payment

(1) 6 Q. B. D. 345.

(2) 18 Ch. D. 449.

(3) 7 Sim. 438, 442.

(4) 10 Hare, 217. 17/Jan 228

by a person liable to pay either principal or interest, that is, the mortgagor or his agent. That is decided in *Chinnery v. Evans* (1). The 1 Vict. c. 28 was passed to supplement an omission in sect. 40 of 3 & 4 Will. 4, c. 27.

Lord *Westbury* in that case discusses that section and also the Act now in question, and after saying with regard to sect. 40 that the payment of money to the mortgagee by the person liable to pay in respect of the interest on the mortgage continues the mortgage in its integrity, says (2), the same principle applies to both sections, and the same *ratio decidendi* applies.

It must be a payment such as to constitute an acknowledgment by the mortgagor. The payment in this case was by a tenant of rent as rent, which the mortgagor could not prevent, but which upon the evidence it appears that the mortgagor disapproved of, and the subsequent rent and also possession of the property was given up to her, so that if there could be in law any ratification or adoption of the payment by the mortgagor there was none in fact.

At all events, even if the payment by *Wade* gave any right to the mortgagees as regards the part in his occupation, it cannot be extended to give any right as to the rest of the mortgaged property.

*Cookson*, Q.C., and *Cozens-Hardy*, Q.C., for the Plaintiffs :—

Payment as to one part of the property in mortgage will keep alive the mortgagee's right of foreclosure as to the rest.

We say that there has been such a ratification and adoption of the payment by the mortgagor as to make it a payment by the mortgagor, or on the mortgagor's behalf. The evidence is, that the Defendant had notice that the mortgagees refused to allow her to receive the rent, and intended to press the tenants for payment of the rent to them, and that after the payment by *Wade* she only said that he ought not to have paid the mortgagees.

An action for foreclosure is an action for recovery of land : *Heath v. Pugh* (3), approving *Wrixon v. Vize* (4), and is therefore within the 1 Vict. c. 28, and time therefore runs only from "the

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(1) 11 H. L. C. 115. 10/11/85 (3) 6 Q. B. D. 345.

(2) Ibid. 133. 10/11/85 (4) 3 D. & War. 104.

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last payment of some part of the principal or interest." We say this payment was such a payment. It was a payment to the mortgagees as mortgagees, not owners, for the ownership and beneficial title to the mortgaged property does not vest in a mortgagee till foreclosure absolute: *Heath v. Pugh* (1). It is a payment of principal or interest within the Act, because everything is such a payment which the payee must in the account between him and the mortgagor give credit for to the mortgagor. If the payee who has the right to appropriate on receiving rents of the mortgaged property appropriates the money to principal or interest, the mortgagor cannot dictate to him and alter that appropriation, and those who say that the £5 went towards something else must prove it. A payment made by a stranger, if made in satisfaction of the mortgage debt, is enough.

[BRETT, L.J.:—If the mortgagee accepts it as such, it may be, but this is not the case of a payment by a stranger in satisfaction of the debt.]

The 1 Vict. c. 28 does not say by whom the payment is to be made, everything is payment within the Act which when received by the payee goes in satisfaction of the whole or part of the mortgage debt.

[JESSEL, M.R.:—The principle underlying all these *Statutes of Limitations* is, that payment implies an admission of liability, as Lord *Westbury* in *Chinnery v. Evans* (2), says, "The statement 'I have paid' may involve the admission that I was liable to pay."]

He was then dealing with the 40th section of 3 & 4 Will. 4, c. 27, and the fact that the earlier statute has the words "by the mortgagor or his agent," and that a later statute *in pari materia*, enacted expressly to supply a defect in the earlier statute, omits that qualification contained in the earlier statute, strongly supports our contention that the payment need not be made by the mortgagor or his agent. Lord *Cranworth* (3), speaking of 1 Vict. c. 28, says, "The statute says nothing as to the person by whom the payment is to be made." That case was on the 40th section of 3 & 4 Will. 4, c. 27.

(1) 6 Q. B. D. 345.

(2) 11 H. L. C. 129. 10 June 1882.  
(3) 11 H. L. C. 138.



Then the receipt of rent on one part of the property keeps the right alive as to the other part : see per Lord *Wensleydale* in *Chinnery v. Evans* (1).

[They also referred to *Kinsman v. Rouse* (2).]

*Kekewich*, in reply.

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JESSEL, M.R. :—

This is an appeal from a decision of Mr. Justice *Fry*. The question which has occupied the longest portion of the time in argument, and which is the most important question, is what is the proper construction of the *Statute of Limitations* of 1 Vict. c. 28, which is additional to and explanatory of the prior statute of the 3 & 4 Will. 4, c. 27.

The question is first, is this foreclosure action an action for the recovery of land ?

Having regard to the decision of Lord *St. Leonards*, when Lord Chancellor of *Ireland*, in *Wrixon v. Vize* (3), and the recent decision of the Court of Appeal in *Heath v. Pugh* (4), we are bound to hold that it is. That being so, the question is whether sect. 2 of 3 & 4 Will. 4, c. 27 is applicable, or whether by reason of the enactment of 1 Vict. c. 28, time has not run, “although more than twenty years may have elapsed since the time at which the right to bring such action or suit in equity” (*i.e.*, to recover land) “shall have first accrued.”

In this case, in 1878, the mortgagees called on the tenants of the land in mortgage to pay rent to them, and one of the tenants, named *Wade*, in answer to that call, paid them £5, a half year’s rent of the part occupied by him. The only question is whether that payment was a payment of any part of the principal or interest within the meaning of the later enactment.

That payment was admittedly made as rent, it was required to be paid as rent ; and was received as rent. The argument on the part of the Respondents, which succeeded before Mr. Justice *Fry*, was this, that the statute does not require the payment to be made by any particular person, that a payment of rent by a tenant to a

(1) 11 H. L. C. 142. *19 Jan H.S. 855* (3) 3 D. & War. 104.  
(2) 17 Ch. D. 104. (4) 6 Q. B. D. 345.

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mortgagee will have to be taken into account, and allowed for as between the mortgagee and his mortgagor, and that consequently it amounts to a payment of principal or interest within the statute.

The answer to this argument, and I conceive it to be a correct answer, is twofold. It is said in the first place it is not a payment of principal or interest, and secondly, that in order to be a payment within that statute it must be made by a person liable to pay principal or interest, and in this case it was not made by a person liable to pay principal or interest. I do not think that this was a payment of principal or interest at all. It is quite true that at the end of the account to be taken between mortgagor and mortgagee it may be that this payment will go against principal or interest; but so long as the account remains open between them the mortgagee is entitled out of the receipts to deduct his expenses for repairs and other just allowances; and it is only the final entry on the whole account which shews on which side the balance lies. There is no appropriation of any one payment at any time to any particular item unless there has been an actual appropriation at the time by contract between the parties. It is impossible to say that any particular item upon one side corresponds with any particular item upon the other side of the account.

It is only on the final result of the account as taken between mortgagor and mortgagee that there can be any appropriation of the rents to principal or interest.

The second part of the answer was, whether the payment was or was not a payment of principal or interest, it was not made by a person liable to pay principal or interest. The person who paid was tenant—he paid the £5 as rent; how could it be said to be paid in any other character? The mortgagees received it as rent as the legal owners of the property. It was quite immaterial to the tenant whether the mortgage was or not subsisting. If all the mortgage debt had been paid with the exception of £4 the mortgagees could still exact the whole £5 as a rent, although, of course, they would have to account for it to their mortgagor.

The question is: was the payment made by the mortgagor or any person liable to pay?

Clearly the tenant is not liable to pay either the principal mortgage money or interest; he is liable to pay rent whether the amount of the rent be more or less than the amount of the interest on the mortgage debt. The underlying principle of all the Statutes of Limitation is, that a payment to take a case out of the statute must be a payment by a person liable, as an acknowledgment of right. It is so put by Lord *Westbury* in the course of the argument in *Chinnery v. Evans* (1), where he says: "The statement 'I have paid' may involve the admission that I was liable to pay, and in that way the act of payment by one mortgagor keeping alive a charge against several is intelligible." That is the theory of all the Statutes of Limitation; the idea is not intelligible except upon the notion of the payment being an admission of right. The case of *Chinnery v. Evans* does really decide the point, and I say so for this reason, that the learned Lords who gave judgment in that case treated the 40th section of the Act 3 & 4 Will. 4, c. 27, as if the words therein contained "by the person by whom the same shall be payable, or his agent," did not apply to the payment but to the signature of the writing. I am not prepared to say that that is not the true construction of the section—it is certainly more grammatical; but at all events they gave it that construction. That being so, Lord *Westbury* says this (2): "The first question which is raised by the present appeal relates to the true construction of the 40th section of the statute 3 & 4 Will. 4, c. 27, and also to that of the statute 1 Vict. c. 28." So it is evident that he is discussing both sections. Then (3) he says, "The words of this section (sect. 40) upon which the present question turns are 'unless in the meantime some part of the principal money or some interest thereon shall have been paid.'" He stops there; he then discusses those words and winds up by saying (4), "It is quite clear that the payment of money to the mortgagee by the person liable to pay in respect of the interest on the mortgage continues the mortgage in all its original integrity and force;" and then, lastly (5), "I should have stated that the other statute, the 1 Vict. c. 28, was passed for the purpose of preserving

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(1) 11 H. L. C. 129.

(2) Ibid. 131.

(3) 11 H. L. C. 132.

(4) Ibid. 133.

(5) 11 H. L. C. 133.

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in the mortgagee the right to make an entry and bring an ejectment to recover the lands, the language of the 40th section of the former Act being confined to cases of recovery of the money; the same principle is applicable to both, and the same *ratio decidendi* will apply to both sections."

It appears, therefore, that Lord *Westbury* was of opinion that the payment mentioned in the later Act is a payment by a person liable to pay. I think Lord *Cranworth* was of the same opinion, but that is not quite so clear. After first saying that a payment by a stranger will not do, he says (1), "The payments in this case were not payments by a stranger; for though a receiver appointed under the Irish statute 11 & 12 Geo. 3, c. 10, is an officer of the Court, yet he is certainly no stranger to the mortgagor but a person paying for him and on his account what he is bound to pay."

Therefore on principle and on authority I think that the payment to take the case out of the statute must be a payment by a person who is bound to pay the principal or interest of the mortgage-money, and this is not such a payment.

Even if there were evidence of the fact, I think that the doctrine of ratification would not apply, because it was not a payment on behalf of the mortgagor, but simply a payment which the tenant, as tenant, was bound to make. The character of that payment could not be altered by anything done afterwards between the mortgagor and mortgagees.

There could not be a ratification in law, and there was no evidence of it in fact. I thought it right to observe upon the point, because Mr. Justice *Fry* seems to have considered that there had been such a ratification and adoption by the mortgagor of the payment of rent by *Wade* as to make the payment a payment on behalf of the mortgagor.

The appeal must therefore be allowed as to all the property included in the mortgage except as to that part which was in the possession of *Wade*, of which possession was taken  $2\frac{1}{2}$  years ago by this payment of rent, and so sect. 2 of 3 & 4 Will. 4, c. 27, does not apply. For this reason the appeal as to that part of the property was, I will not say abandoned, but not pressed.

(1) 11 H. L. C. 139.

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BRETT, L.J. :—

The facts in this case are not in dispute, and the whole question turns upon the construction of a statute, and what is its application to the undisputed facts. Inasmuch as this payment of rent by the tenant to the mortgagees will go into the account between the mortgagor and mortgagees in favour of the mortgagor, I should have been well pleased to be convinced that by any reasonable construction of the statute that payment could have been treated as a payment by the mortgagor so as to be within the 1 Vict. c. 28. But upon what I consider to be the ordinary rule of construction of a statute, I cannot come to the conclusion that this is a payment within the meaning of that Act.

The question is, What is the construction of that statute? It seems to me that the statute is an enabling statute, because a bar in the case of an action for the recovery of land is put by the 3 & 4 Will. 4, c. 27, s. 2; but seeing that that enactment is more rigorous than any Statute of Limitations before that time, the 1 Vict. c. 28 made a modification of the more rigorous statute, and must be read with it as a modification and in the nature of a proviso upon the earlier statute.

Then the question arises whether payment of rent by a tenant to a mortgagee who has exercised the right to demand the rent, is a payment of principal or interest within that section. I come to the conclusion that it is not, for three reasons: 1. It is, at the present stage, no payment at all as between the mortgagor and mortgagees—it is only an item in an account which will have to be settled between the mortgagor and mortgagees—an item in an account which is to go to the credit of one party to that account, that account containing many items more on the same side besides principal and interest and costs—*e.g.*, expenses, repairs, &c. That cannot be called payment either of principal or interest at all. 2. It is not a payment within the section because it is not, as made, a payment of principal or interest—it is a payment of rent—rent paid by the person making the payment, and rent received by the person receiving the payment. It seems to me that payment made as of rent and received as of rent cannot be said to be a payment of principal or interest. 3. But even if it could be held to be a payment of principal or interest, it is not a payment

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at all by the mortgagor or any agent of the mortgagor, or by any person bound to make payment of principal or interest on his behalf, and I think that a payment of principal or interest, to be a payment within this section, must be made by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, as was the receiver in the case of *Chinnery v. Evans* (1).

The question may be asked, Why must this payment be by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest on his behalf?

It seems to me the reason is that in all Statutes of Limitations the principles on which they are founded is, that in those cases in which a payment is allowed to take the case out of the operations of the *Statute of Limitations* it must be such a payment as amounts to an acknowledgment of liability. That is the case with regard to acknowledgments under *Lord Tenterden's Act*. The very principle of saying that a payment shall take a case out of the operation of a statute involves the assumption that it must be such a payment as to amount to an acknowledgment of right by the person who would be liable to make the payment, or his agent. I think it is so, not only on principle, but that it has been also so held and was the ground of the decision in *Chinnery v. Evans*.

The first question in dispute as to that case is whether the judgment applied to 1 Vict. c. 28 or only to sect. 40 of 3 & 4 Will. 4, c. 27. I think that the judgment was intended to apply to both, but supposing that it did apply only to the earlier statute, it seems to me impossible to suppose that the judgment of the House of Lords read into the previous paragraph (as a mere matter of reading) the words "by the person by whom the same shall be payable or his agent." I say it seems impossible by any distortion of the sentence to make these words apply to the previous paragraph of the section, because they are governed by the word "signed," "signed by the person by whom," &c. It seems to me impossible to read these words which have reference to the signature into the previous paragraph relating to the payment.

I think, therefore, that the construction of that section by the House of Lords would have been the same if there had been

(1) 11 H. L. C. 115.

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no such words as "or if some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent."

They construed the former part of the section as if it had stopped at the word "paid"; and construing that section as if it ended there they came to the conclusion that by a necessary implication, on the ground of the statute being a Statute of Limitations, and the payment therefore of necessity being an acknowledgment of right, the word "payment" involved the addition "by the person by whom the same shall be payable or his agent."

Now, supposing that the construction given by that case was of sect. 40 only, and not of 1 Vict. c. 28, nevertheless, even if it be the construction of the former section, it is a judgment the principle of which is applicable to 1 Vict. c. 28. Of course if it were a judgment on the statute of 1 Vict. c. 28, it would be binding on us as a judgment. If it is only a judgment on the statute of 3 & 4 Will. 4, c. 27, s. 40, the principle is binding on us as a principle of construction, and is binding as an authority to construe the statute of 1 Vict. c. 28 in the same way.

On the ordinary rules of construction, and on the authority of *Chinnery v. Evans* (1), I feel bound to say that a payment, to come within 1 Vict. c. 28, must be a payment by a person liable as mortgagor or some person on his behalf, or such a person as was the receiver—a person entitled to pay on his behalf. For all these reasons, then, I consider that this payment of £5 rent was not a payment within 1 Vict. c. 28. In other words, that the kind of payment contemplated under the section is some payment of principal or interest, and made by some such person as is mentioned in sect. 40 of 3 & 4 Will. 4, c. 27. Any other conclusion would lead to a strange result, because while it could not be denied that a payment which under the statute of 3 & 4 Will. 4, c. 27, is a good payment for the purpose would be good under 1 Vict. c. 28; it is said, and it seems to have been assented to by the Judge below, that the converse is not true, and that a payment which would not prevent the running of the statute under 3 & 4 Will. 4, c. 27, s. 40, would prevent the running of the statute under 1 Vict. c. 28, that is, the right to recover the mortgage money would be barred

(1) 11 H. L. C. 115.

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while the right to recover the land would not. Therefore, so far as the general question goes, I must differ from the decision of Mr. Justice *Fry*.

As to ratification or adoption of the payment by the mortgagor, from the construction of the statute, and considering that payment of rent could not be payment of principal or interest, it follows that this payment having been made by the tenant as of rent there could not be a ratification or adoption of the payment as a payment of principal or interest by the mortgagor. If the person paying does not assume to pay it as principal or interest it cannot be adopted as such a payment by the person who was liable to pay the principal or interest. Therefore I venture to differ from that part of the decision of Mr. Justice *Fry* in which he holds that there was such ratification or adoption.

Mr. Justice *Fry* says: "I think a payment will keep the right alive if it be made by the mortgagor or by any agent of the mortgagor"—and so far I agree—but then he goes on to say, and this is the very ground of his judgment, "or by any person who, as between the mortgagor and mortgagee, is liable to make any payment to the mortgagee in satisfaction of the mortgage debt." From that part I dissent.

HOLKER, L.J.:—

I am of the same opinion. The main question which arises here is what is the meaning of the word "payment" in the 1 Vict. c. 28? The words are:—[His Lordship read the section, and continued:—] The Legislature must have had some reason for providing that some payment of principal or interest should have the effect of taking the case out of the operation of the statute. What could that reason be if not that the payment amounted to an acknowledgment of the liability by the person who made the payment. It is reasonable to provide that the statute shall not run if the person in possession of the land had acknowledged the title of the real owner of the land.

What I have always understood to be the principle of the enactments as to limitations—and my view seems to be affirmed by the decision in *Chinnery v. Evans* (1)—is, that the payment is to

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amount to an acknowledgment, and if that is so it cannot be said by any possibility that the payment in this case was a payment amounting to an acknowledgment.

I think that this payment of rent was not such a payment; it certainly was not a payment of principal or interest: but if it was, how could a payment made in such a state of circumstances—a payment enforced against a tenant by the mortgagee—be an acknowledgment by the mortgagor? But really it was no payment within the meaning of the section.

The question was concluded in *Chinnery v. Evans* (1). If that case is read carefully it is clear that it was intended to be a decision on both statutes; because Lord *Westbury* says (2): “The first question which is raised by the present appeal relates to the true construction of the 40th section of the statute 3 & 4 Will. 4, c. 27, and also to that of the statute 1 Vict. c. 28.” I think, therefore, that it was intended to be a decision on both statutes; and if it was intended to be a decision on both, then it is clearly binding on this Court. But if not, it is the decision of that Court upon a statute which contains precisely the same language as the later statute, if you stop at the end of the provision in sect. 40 with regard to payment, and it seems to me that all the Lords, although, it may be, taking notice of the construction of the clause in the 40th section as to acknowledgment, seem to have intended to base their decision in the case upon the language occurring before that clause; because Lord *Westbury* says (3), “The words of this section” (that is sect. 40), “upon which the present question turns, are, ‘unless in the meantime some part of the principal money or some interest thereon shall have been paid.’” And so we have it from Lord *Westbury* that the question to be decided in that case was, what was the meaning of those words? and the House decided that those words implied that the payment was to be made by the mortgagor or his agent. Mr. *Cookson* admits that if that decision in *Chinnery v. Evans* had been on the 1 Vict. c. 28, it would have conflicted with the decision of Mr. Justice *Fry*.

But that case did decide that under the words cited by Lord

(1) 11 H. L. C. 115.

(2) 11 H. L. C. 131.

(3) 11 H. L. C. 132.

C. A. *Westbury* read by themselves the payment must be by the person  
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That being the decision upon the words of the 40th section, and those words being practically the same as those in the statute now under consideration, I consider that the present point has been decided by *Chinnery v. Evans* (1), and decided adversely to the view taken in this case by Mr. Justice *Fry*.

The action was ordered accordingly to be dismissed, so far as regards all the land, except that late in the occupation of *Wade*. No costs of the appeal.

Solicitors for Appellant: *Gregory, Rowcliffes, & Co.*, agents for *J. Rogers, Ely*.

Solicitors for Plaintiffs: *T. H. Bartlett*, agent for *W. Marshall, Ely*.

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Feb. 7.

*In re* MIDDLETON:

THOMPSON *v.* HARRIS.

[1876 M. 338.]

*Administration Action—Real and Personal Estate—Inquiries as to Real Estate—Apportionment of Costs.*

It is the now settled practice of the Chancery Division that the costs of an administration action so far as they have been increased by the administration of the real estate are to be borne by that real estate.

An action was brought by the heir-at-law of a testatrix who had given by will certain legacies, but had died intestate as to her real estate and residuary personalty, for the administration of her real and personal estate:—

*Held*, by *Fry, J.*, that the entire costs of the action were payable primarily out of the residuary personal estate:

*Held*, by the Court of Appeal, varying the order of *Fry, J.*, that the costs of the action, so far as they had been increased by the administration of the real estate, must be borne by the real estate.

*Per Jessel, M.R.*:—When an estate is insufficient the Plaintiff does not necessarily get his costs in priority to the Defendants.

THIS was the further consideration of an action brought by *Myra Thompson* against the surviving executor of the will of

(1) 11 H. L. C. 115. 10 Jan 45. 855.

*Elizabeth Middleton*, for the administration of her real and personal estate. The testatrix, by her will, dated the 11th of February, 1868, gave a few specific and pecuniary legacies, but did not dispose of her real estate or of the residue of her personal estate, and she died in June, 1876, intestate as to such real estate and residuary personalty.

*Myra Thompson* claimed as one of her co-heiresses-at-law, and also (but contrary to the fact) as one of the next-of-kin of the testatrix.

The usual administration judgment was made on the 12th of January, 1877, and inquiries were directed who were the heirs-at-law and who were the next of kin of the testatrix living at the time of her death.

Considerable difficulty was experienced in finding the other coheiress-at-law.

By his certificate, dated the 11th of March, 1881, the Chief Clerk found that the Plaintiff *Myra Thompson*, widow, was one of the two coheiresses-at-law of the testatrix, and that *Thomas Petchey* was her sole next of kin.

The question now arose whether the costs of the action (including the costs of the inquiry as to who were the heirs-at-law) ought to be apportioned between the real estate and residuary personal estate, or whether they ought to be borne by the residuary estate exclusively. The further consideration came on to be heard before Mr. Justice *Fry* on the 19th of May, 1881.

*Cookson*, Q.C., and *Nalder*, for the Plaintiff.

*E. Beaumont*, for the legal personal representatives of *Thomas Petchey*.

*Dunn*, for the executor.

FRY, J. :—

In this case the testatrix gave certain specific legacies, but died intestate as to her residuary personalty and as to her real estate. One of the coheiresses-at-law has commenced an administration action suggesting (contrary to the fact) that she was one of the

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next of kin. The Court has thought fit to pronounce judgment for the administration of the real and personal estate; and the question now arises whether the entire costs are to be borne by the residuary personal estate, or whether they are to be apportioned between the real and the residuary personal estate.

If the matter were *res integra* I should be inclined to hold that the costs should be paid rateably. But this question has been the subject of a series of decisions, and I should be merely making new law if I were not to follow them. In many respects the law favours the heir; and one of the benefits enjoyed by the heir is that when an action is brought to administer the real and personal estate, the costs are to be borne by the personal estate in the first instance. For that *Pickford v. Brown* (1) is a very strong authority. There two suits having been instituted to obtain the decision of the Court upon the construction of a will—one as to the testator's real and the other as to his personal estate—it was held that the costs of both must be borne by the personal estate in the first instance.

And that it makes no difference that the real estate is real estate descended seems certainly to have been decided in *Stringer v. Harper* (2). And independently of that decision I cannot think that that fact would make any difference.

In my opinion Vice-Chancellor *Kindersley* was well founded in the observation he made in *Randfield v. Randfield* (3), "that there was no case in which there not being a mixed fund by conversion, the Court had determined there should be an apportionment." No doubt in *Sanders v. Miller* (4) the Master of the Rolls apportioned the costs; but I cannot help thinking that in that case his Honour proceeded upon the mistaken impression that there was a trust for conversion. Whether that be so or not, that case is contrary to the current of authority (5).

It is said that this action is unnecessary; but the answer to that is, that the Court has thought fit to pronounce judgment for the administration of the real and personal estate. I think there is nothing in the circumstances of this case to make it an exception

(1) 2 K. & J. 426. *22 May 1878* (3) 11 W. R. 847, 848.

(2) 26 Beav. 585. *5 June 1842* (4) 25 Beav. 154.

(5) See Morgan on Costs, p. 117.



to the usual rule, that the costs are payable out of the general personal estate only.

From this decision the representatives of *Thomas Petchey* appealed. The appeal was heard on the 7th of February, 1882.

*Glasse*, Q.C., and *E. Beaumont*, for the Appellants:—

This was a joint administration, both of the real and also of the personal estate. The case falls within the decision of *Patching v. Barnett* (1) decided in the Court of Appeal since the date of the hearing of this case before Mr. Justice *Fry*, and according to that decision the costs must be apportioned, and the additional costs, so far as they were increased by the administration of the real estate, must be borne by the real estate. If there is any series of decisions to the contrary, which we do not admit, they must now be treated as overruled by *Patching v. Barnett*.

*Cookson*, Q.C., and *Nalder*, for the Plaintiff:—

This case is not within *Patching v. Barnett*. That case only decided that where in the administration of an estate a distinct internal question, so to speak, is raised with regard to the real estate, *e.g.*, questions between tenant for life and remaindermen—or of a gift being void for remoteness—there the additional costs incurred by the discussion of that question are to be borne by the real estate.

A long series of decisions has laid down a well-settled general rule that, except in the case of a mixed fund, as in *Eyre v. Marsden* (2), where the real estate is given to one, and the personal estate to another, and questions arise as to the real estate, the costs occasioned by those questions are borne by the general personalty. In *Pickford v. Brown* (3) Vice-Chancellor *Wood*, and in *Randfield v. Randfield* (4) Vice-Chancellor *Kindersley*, treated this as a clearly settled distinction.

See also *Ripley v. Moysey* (5); *Stringer v. Harper* (6).

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(1) 51 L. J. (Ch.) 74.

(4) 11 W. R. 847.

(2) 4 My. &amp; Cr. 231.

(5) 1 Keen, 578.

(3) 2 K. &amp; J. 426, 436.

(6) 26 Beav. 585.

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In *Sanders v. Miller* (1) no doubt the costs were apportioned, but only *Eyre v. Marsden* (2) was cited.

The inquiry in this case was necessary, for the purpose of clearing the estate of debts, and the costs are only the costs of general administration.

The Plaintiff is at all events entitled to his costs in priority to the Appellants, if the estate should prove insufficient. The order in which costs are paid in such an event is stated in *Daniell's* Chancery Practice (3); 1st. The legal personal representative gets his costs, charges, and expenses; 2nd. The Plaintiff gets his costs because he does the work of the suit; and 3rd, the other parties.

[JESSEL, M.R.:—I do not admit the correctness of that rule. The executor comes first, but not necessarily the Plaintiff.]

In *Wedgwood v. Adams* (4), the Plaintiff failed, but was held entitled to his costs on the ground that he had done the work of the suit.

[JESSEL, M.R.:—A Plaintiff who institutes a suit for the benefit of others, obtains a charge on the fund, but not necessarily in preference to the defendants. The rule is too broadly stated in *Daniell. Wetenhall v. Dennis* (5), a legatee's suit, is just the contrary.]

*Glasse*, in reply:—

We ask for costs only so far as they have been increased by the administration of the real estate. In *Abbiss v. Burney* (6), although this point is not mentioned in the report, Vice-Chancellor *Malins* did in fact apportion these costs.

JESSEL, M.R.:—

I think that this case is covered by *Patching v. Barnett* (7), but even if it is not, there is no practice established binding on the Court, such as Mr. Justice *Fry* has held to exist.

(1) 25 Beav. 154.

(2) 4 My. & Cr. 231.

(3) 4th Ed. p. 1306.

(4) 8 Beav. 103, 105.

(5) 33 Beav. 285.

(6) 17 Ch. D. 211.

(7) 51 L. J. (Ch.) 74.

*g/m 25.12.6*

It is only just that the costs of administration so far as they have been increased by the administration of real estate should be borne by that real estate, and I propose to vary the order of Mr. Justice *Fry* by so declaring.

BRETT, L.J.:—

The present case is clearly governed by the phraseology of *Patching v. Barnett* (1). But it is argued that what was said in *Patching v. Barnett* is not binding on this Court, because the point relied on was not necessary for the decision in that case, and therefore, that what was said on that point was only a *dictum* not binding on us, and therefore this Court might come to a different conclusion.

But it seems to me that the first point whether there was to be any apportionment or not, was distinctly raised and necessarily so, and this very particular point being brought before the Court, the decision of the Court is binding on us whether we agree with it or not.

Then it was suggested that *Patching v. Barnett* was supposed to overrule the long settled practice of the Court. If that were really the case I should have thought it a very despotic exercise of the power of the Court of Appeal so to act, but however despotic it might be, this Court would be bound by it, and it must be left to a higher tribunal to consider the decision. But I must confess that I do not think there was any such settled practice as alleged before *Patching v. Barnett*.

The different decisions of some Vice-Chancellors are referred to, but it is manifest that such decisions were given upon the principle of comity, that one Court of co-ordinate jurisdiction would not decide contrary to the decision of another Court of co-ordinate jurisdiction. To my mind the Judges did not say that there was any settled practice as alleged for the Respondents, two of them if not three, including Mr. Justice *Fry*, and certainly Vice-Chancellor *Kindersley* say that they only so decided in obedience to that doctrine of comity to which I have referred, and that if they had had to decide the question for the first time they would have decided the other way.

(1) 51 L. J. (Ch.) 74.

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We then have Vice-Chancellor *Malins* in the case of *Abbiss v. Burney* (1) making this apportionment, therefore it is clear that he did not know of this alleged settled practice, so that it is not for me to say that in the case of *Patching v. Barnett* (2) there was any despotic exercise of power by the Court of Appeal. It is the common case of an originally doubtful decision followed by other Courts of co-ordinate jurisdiction upon the ground of comity, and therefore these subsequent decisions do not at all increase the authority of the original case.

Therefore, I think that even if *Patching v. Barnett* were not binding on us, the rule laid down by it is one which we ought to follow. The rule is a just and a fair one, while the contrary rule would be unjust and oppressive. I think we are bound by *Patching v. Barnett*, and I agree with the Master of the Rolls that the order must be varied.

HOLKER, L.J. :—I concur.

Appeal allowed with costs, order of Mr. Justice *Fry* varied by directing that the costs so far as they were increased by the administration of the real estate, were to be borne by the real estate.

*Dunn*, for the executor who had been served with notice of appeal, asked for his costs.

JESSEL, M.R. :—He was rightly served, let him take £10, payable by the Respondents.

Solicitors : *Beaumont & Son ; E. Woodard ; W. C. Clennell.*

(1) 17 Ch. D. 211.

(2) 51 L. J. (Ch.) 74.

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# ERRINGTON v. METROPOLITAN DISTRICT RAILWAY COMPANY.

[1881 E. 852.]

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V.-C. H.

Dec. 3.

*Railway Company—Compulsory Purchase of Minerals—Subsequent Purchase of Minerals under Lands previously acquired—"Expressly purchased"—Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), ss. 6, 16 et seq.—Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 6, 77, 78, 79.*

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A railway company having the usual power to purchase lands under its special Act has, by virtue of the 6th section of the *Lands Clauses Act*, 1845, power also to purchase the minerals under those lands compulsorily at any time before the expiration of the time limited for the exercise of its compulsory powers, if it should deem it advisable.

That power is not taken away by the 77th and following sections of the *Railways Clauses Act*, 1845, which are for the benefit not of the mine owner but of the company, and only exempt the company from the obligation of buying the minerals at once together with the surface lands.

The words "expressly purchased" in the 77th section are not to be confined to "purchased by agreement."

There is no distinction between the severance of ownership vertically, that is, of the surface lands from the mines beneath, and the severance of ownership laterally by the taking by successive purchases of surface lands from the same landowner. So a railway company having already acquired surface lands may subsequently purchase compulsorily the minerals under those lands.

The opinion of the company's engineer, if *bonâ fide*, is the only evidence required by the Court as to the necessity or propriety of any purchase, and the onus of proving want of *bona fides* rests upon the party opposing the purchase:—

Injunction granted against the company by *Hall*, V.-C., discharged.

THE *Metropolitan District Railway Company* were empowered by a special Act, the *Metropolitan District Railway Act*, 1878, which incorporated the *Lands Clauses Consolidation Acts*, and the *Railways Clauses Consolidation Act*, 1845, to extend their railway to *Fulham*, and to purchase lands compulsorily (1).

(1) Sect. 5: "Subject to the provisions of this Act the company may make and maintain in the lines and according to the levels shewn on the deposited plans and sections the railways and works hereinafter described, with all proper stations, sidings, ap-

proaches, floating-stages, works, and conveniences connected therewith, and may enter upon, take, and use such of the lands delineated on the deposited plans and described in the deposited book of reference as may be required for those purposes."

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The Plaintiffs were the owners in fee of certain lands situated at *Walham Green*, and the company served upon them three notices to treat for the purchase of 6a. Or. 36p. of such lands. The notices were dated respectively the 8th of August, 1878, the 26th of February, 1879, and the 18th of March, 1879. None of the notices made any reference to the mines and minerals under the said lands.

The question of compensation in respect of the said notices was referred to arbitration, and the arbitrator made his award on the 20th of December, 1879, valuing the land at £11,660, based upon the footing of the land being building land; the award was also silent as to the mines and minerals.

The company sent to the Plaintiffs' solicitors the draft conveyance of the lands for approval. In that conveyance the company had inserted the words "mines and minerals," but these words the Plaintiffs' solicitors struck out, contending that the company had not "expressly purchased" them and that they had not passed to the company.

On the 19th of October, 1880, the company took out a summons under the *Vendor and Purchaser Act* for a direction that the words struck out should be inserted in the conveyance. The summons having been adjourned into Court, Vice-Chancellor *Hall*, on the 11th of December, 1880, decided that the minerals had not been "expressly purchased" within the meaning of section 77 of the *Railways Clauses Act*, 1845, and dismissed the summons, and that decision was affirmed on appeal in July, 1881.

The time limited to the company for the exercise of their compulsory powers, expired in July, 1881.

On the 17th of June, 1881, before the hearing of the appeal, the company served a fresh notice on the Plaintiffs, that "in the event of its being determined that the company in the purchase already made by them from the Plaintiffs of the lands and hereditaments specified in the schedule to the notice (being the 6a. Or. 36p.) have not acquired the mines and minerals in and under the same they require to purchase and take all such mines and minerals," and required the Plaintiffs to deliver particulars of their estate and interest in the said mines and minerals.

The Plaintiffs on the 8th of July, 1881, issued their writ in this

action against the company, claiming an injunction restraining the Defendant company, their servants, &c., from further proceeding under or in pursuance of their notice to treat of the 17th of June, and from taking any steps to procure the assessment of the purchase-money of the mines and minerals and property comprised in the notice.

An interim injunction was granted on an interlocutory application, and the action came on on the 3rd of December, 1881, on motion for judgment, neither party putting in any pleadings.

The engineer of the company made an affidavit in which he said that the lands already purchased were lands necessary for the railway company for the formation of their line and stations, with goods depôts and sidings and buildings necessary thereto; that he knew well the said lands, and did not believe that there were minerals in them except gravel or clay, which could only be got by removing the surface of the land; that it would be wholly incompatible with the purpose for which the railway company desired the said lands that power should remain in the Plaintiffs to interfere with the surface of the land and thus with the buildings, sidings, and works of the railway.

The solicitors of the Plaintiffs and Defendants respectively also filed affidavits. Mr. *Tweedie*, the Plaintiffs' solicitor, stating his belief that the mines and minerals were not necessary either for the construction of any of the works of the company or otherwise for the purposes of their undertaking.

Mr. *Baxter*, the company's solicitor, after generally confirming the statement of the engineer, stated in the last paragraph that land could not be sold as building land reserving any right to interfere with the surface, and that the company in selling land for building would have to give up their claim to any minerals under the same, inasmuch as those minerals could not be got without removal of the surface of the land.

*Hastings*, Q.C., and *Archibald*, for the Plaintiffs:—

This case comes within the sects. 77, 78, and 79 of the *Railways Clauses Act*, 1845. The company in their notice to treat for the surface land did not "expressly" state that they would purchase the minerals under it, and consequently the minerals belonged to

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the Plaintiffs. A similar question was decided in the case of *Fletcher v. Great Western Railway Company* (1), and by the House of Lords in the case of *Great Western Railway Company v. Bennett* (2).

The company had under the provisions of their own Act power to acquire six acres of land, but it is submitted that they had no power on the true construction of the Act to purchase the minerals. If they had such a power, it was before the last notice was completely exhausted. They had no right to give a further notice to treat for the purchase of the minerals; therefore, the Plaintiffs are entitled to the injunction which they ask for, and it should be made perpetual, and with costs.

*Kekewich*, Q C., and *Samuel Roberts*, for the Defendants :—

The company are willing to purchase and pay for the minerals which lie under the land which they have acquired from the Plaintiffs, but the Plaintiffs decline to treat for the sale of them. There can be no doubt, it is submitted, that the company have under the provisions of the *Lands Clauses Act*, 1845, power to purchase these minerals, as they had power to purchase the surface land. Their power is not exhausted, as it does not matter in law whether they give two, three, or more notices to treat for that which they require and wish to purchase. The minerals form part of the land which the company were authorized to purchase. They purchased one part of that land, and now they desire to purchase another part of it. They are under no obligations to purchase the minerals, though they have power, and now wish to do so: *Smith v. Great Western Railway Company* (3).

The question no doubt turns upon the construction of the 77th, 78th, and 79th clauses of the *Railways Clauses Act*, 1845, and some strange results might happen under some circumstances; for instance, suppose land were purchased for the purpose of a tunnel, and coal or ironstone was found there, and which it would be necessary to carry away. They would pass by the conveyance. That is to say what could be carried away would pass, but what was below the permanent railway would not pass. The

(1) 4 H. & N. 242; 5 H. & N. 689.

(2) Law. Rep. 2 H. L. 27-41.

*6 Jan 1891* (3) 2 Ch. D. 235; 3 App. Cas. 165.



real solution of the question raised here is that the company have power to purchase, but cannot be compelled to do so. When the owner is desirous of working any mine under or near the railway he must give the proper notice as provided in sect. 78, and the company can purchase, and if they do not, they must submit to any damage that may result from the working of the mine. The company have done everything required by the statutes. They wish to "expressly" purchase these minerals, and they ought to be allowed to do so: *Dixon v. Caledonian and Glasgow, and South Western Railway Companies* (1); *Dart, Vend. and Pur.* (2). They also referred to *Martin v. London, Chatham and Dover Railway Company* (3).

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HALL, V.C. :—

It seems to me that the Defendants—the company—are not under the circumstances appearing in this case entitled to proceed under the notice which they have given to the Plaintiffs to treat for the purchase and take these minerals. It must not, however, in any way be understood that I mean to decide that the company when they gave the first notice to treat for the purchase of, and take the land necessary for their line of railway, were not competent to say that they desired to take the land and the minerals under it. Such a notice as that they were entitled to give, and if they had given it, they would be entitled to the minerals as well as to the surface land. They would then have given "express" notice to take the minerals, and would have been entitled to have a conveyance of them with the surface land. That would have brought them within the 77th section of the *Railways Clauses Act, 1845*, and they would have "expressly purchased" the minerals as therein provided. I do not say that it would be necessary under such circumstances that the conveyance should expressly mention the minerals. They would pass if they had been expressly purchased. But when a notice has been given in proper form to take land, and it did not indicate any intention to take the minerals, I consider that as regards the notice it

(1) 5 App. Cas. 820.

(2) Vol. i. 5th Ed. p. 371.

(3) Law. Rep. 1 Eq. 145; 1 Ch. 501.

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only applies to the land. The notice must be given once for all as to the land required, under the clauses in the statute, and without the minerals. That is to say when once the notice is given it applies as from that time, assuming of course that the parties do not come to any further arrangements. The rights of the parties *inter se*, as regards the minerals, are settled by the statute. From the date of the notice—the rights being so settled—it is not competent for the company to alter them by giving a further notice, and in this very case, when it was before the Court of Appeal on a former occasion, that was, I consider, the opinion of one of the learned Judges. It seems to me to be plain that the company could not go on giving notices to purchase the property in pieces—first the land and then the minerals. There is no necessity for a repetition of the notice in regard to the same piece of land, as the mode of proceeding by the railway company is sufficiently provided for by the 78th and 79th sections of the statute. Upon the construction of the three sections it seems to me that it was not competent to the company to give the notice in question, and that the Plaintiffs were right in coming to the Court for an injunction, which I now grant, with costs to be paid by the company.

T. F. M.

C. A. From this decision the company appealed. The appeal came on to be heard on the 14th and 17th of February, 1882.

*Davey, Q.C.*, and *Kekewich, Q.C.* (*S. Roberts* with them), for the company:—

The question is whether a railway company has power to purchase mines compulsorily if it deems it advisable. There is no distinct decision upon the point, but there are *dicta* of judges both ways. The Vice-Chancellor has decided only that the company having elected by their original notices to take lands without the minerals have exhausted their compulsory powers, and cannot now, although within the time limited, give notice to treat for the purchase of the minerals under the same lands.

If it were not for the 77th, 78th, and following sections of the *Railways Clauses Act*, a railway company, like any other company, would under the 6th section of the *Lands Clauses Act* be able to

purchase mines—mines being included in the word “lands” used in that section—but those sections do not deprive a railway company of any right, but are enacted for the benefit, not of the mine owner, but of the company, exempting the company from the obligation of purchasing the mines at once, while giving it means of acquiring possession of them or preventing the working of them by the owner to the injury of the railway. The 77th section by its very wording impliedly assumes that a company may purchase mines, and there is nothing to shew that the words “expressly purchased” in that section have reference only to a purchase by agreement.

We rely on what was said by *Cairns, L.C.*, in *Smith v. Great Western Railway Company* (1), and that case does incidentally decide that “lands” includes mines, and *The Great Western Railway Company v. Bennett* (2) is no authority against the power of a company to purchase mines. The decision there was that the company could not give a counter-notice after the expiration of the thirty days after the notice of the mine owner, and there are dicta in the judgments of Lord *Westbury* and Lord *Cranworth* in that case in our favour.

The term “minerals” includes everything which can be got out of the land of a merchantable character, and useful for any purpose: *Midland Railway Company v. Checkley* (3).

A railway company when purchasing surface lands is not bound to give notice once for all for all the land it requires—the only limit to the right of giving notice is that of time—and we submit that there is no more reason why land should not be treated as severed vertically, *i.e.*, the surface from the mines below it, than that it should not be treated as severed horizontally—that is one acre of surface land from another acre of surface land.

There is nothing to impeach the *bona fides* of the opinion of the company’s engineer as to the mines being required, and the Court will, therefore, according to its usual practice, accept that opinion as correct. The word in the 5th section is “required,” not absolutely necessary.

(1) 3 App. Cas. 165, 180.

(2) Law Rep. 2 H. L. 27.

(3) Law Rep. 4 Eq. 19, 25.

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Assuming for the purpose of argument that the company could have purchased these mines compulsorily if they had in their original notices specified the mines as part of the subject-matter of the purchase, we submit that coming as they now do, after acquiring the surface, to ask to purchase these mines alone they are bound to prove that that purchase is necessary for the purpose of their railway. Their only power to purchase at all, comes from the 5th section of their own Act and the 6th section of the *Lands Clauses Act* incorporated with it, and that power is confined to the purposes specified in the 5th section, that is, the “making and maintaining the railway, works, &c.”

The mere general statement of their engineer that they are required will not do, he must specify the particular object for which they are required, to enable the Court to decide for itself on the *bona fides* of the claim: *Flower v. London Brighton and South Coast Railway Company* (1); *Eversfield v. Mid-Sussex Railway Company* (2).

The company have not shewn that they require the minerals for any of the purposes specified in the 5th section, and from the affidavit of their solicitor it would appear that they are wanted with a view to a subsequent sale by the company of the property as superfluous land.

[JESSEL, M.R.:—I think the authorities say that the statement of the company that they want it is sufficient, unless the other side prove that they do not.]

[*Davey, Q.C.,* referred to *Stockton and Darlington Railway Company v. Brown* (3), and *Kemp v. South Eastern Railway Company* (4).]

The *Stockton* railway case was the case of a purchase of surface lands, which, *primâ facie*, the company would require, and had no reference to mines.

The necessity for this purchase is distinctly put in issue by the affidavit of the Plaintiffs' solicitor.

[JESSEL, M.R.:—That affidavit is inadmissible. An affidavit

(1) 2 Dr. & Sm. 330. (2) 9 H. L. C. 246. (3) 3 De G. & J. 286. (4) Law Rep. 7 Ch. 564.



made upon information and belief must state the source of information, a mere statement of belief will not do.]

The company cannot be exposed to any danger by not making this purchase, for if the mine owner were to claim to work and carry away the minerals the company would have their rights under the 78th section of the *Railways Clauses Act*.

Secondly, a railway company has no power at all to purchase mines compulsorily. The clauses of the *Railways Clauses Act*, as regards mines, form a distinct part of the Act, and the relations between a mine owner and a railway company are to be gathered from those clauses only, although in *Smith v. Great Western Railway Company* (1) the House of Lords for the purpose of supplying a *casus omissus* in the 78th section of the Act, read together with it the 6th section of the same Act. But that section only refers to purchase by agreement, and the right of the company to purchase by agreement is not disputed; that we submit is the explanation of sect. 77.

No case has decided that under their compulsory powers to purchase lands a railway company can also purchase mines, while in *Great Western Railway Company v. Bennett* (2) Lord Cranworth says (3) that only the minerals necessary for the purpose of the railway can be taken, all the rest of the minerals must be left till the time for working the mines arrive, and Lord Westbury in the same case (4) says, a railway company is under a disability to purchase mines unopened. And in *Great Western Railway Company v. Smith* (5) Lord Justice James expresses a similar opinion: and see per Vice-Chancellor Wood, in *London and North Western Railway Company v. Ackroyd* (6).

[*Davey, Q.C.*, referred to the observations of Lord Chancellor Selborne in *Dixon v. Caledonian and Glasgow and South-Western Railway Companies* (7), upon the effect to be attributed to a dictum.]

The reason is obvious, because the value of unopened mines cannot be assessed, and the Legislature may well have considered

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(1) 3 App. Cas. 165.

(4) Law Rep. 2 H. L. 41.

(2) Law Rep. 2 H. L. 27.

(5) 2 Ch. D. 235, 244.

(3) Ibid. 40.

(6) 31 L. J. (Ch.) 588.

(7) 5 App. Cas. 820, 826.

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it unjust that while the company is not compelled to purchase the unopened mines, the landowner should be compelled by the company to sell, whenever the company might choose, that of which the value could not be ascertained. The company has the right of compelling the landowner to sell the surface and the owner must have the correlative right of retaining the minerals.

Lastly, we submit that the Vice-Chancellor was correct in holding that the company, having originally given notice to treat for the lands, which did not include minerals, have exhausted their powers. The Plaintiffs were the owners of the fee—were entitled to the land and also to the minerals—so any question as to giving notice to different owners, when the ownership of the surface and mines has been severed, has no application.

[They also referred to *Webb v. Manchester and Leeds Railway Company* (1) as shewing the principles on which the Court will compel companies to exercise their powers.]

JESSEL, M.R. :—

This is an appeal from a decision of Vice-Chancellor *Hall*, raising important questions of construction as regards the *Railways Clauses Act* of 1845.

The points which have been raised in argument are three. The first proposition is, that under the powers of the *Lands Clauses Act*, 1845, and the *Railways Clauses Act*, 1845, a company having the usual powers to take land in their special Act cannot take minerals by compulsion apart from the land. The second point raised is that assuming the company can do so in any case, the company cannot do so if they have originally purchased the surface of the land without the minerals, and that they are not entitled then to give a second notice to treat for the minerals. The third point raised was that whatever the powers of the company might be the railway company are not entitled to purchase any land or minerals unless they are necessary for the purposes of their undertaking. Those are the three points.

Now, as regards the first point it is plain that the word “lands” in the *Lands Clauses Act* includes any hereditaments, which of course includes mines. Upon that point there can be no question.

(1) 4 My. & Cr. 116.

Therefore, standing alone those words would include the power to purchase mines. Is there any reason for cutting them down? I am not aware of any. It must be remembered that the *Lands Clauses Act* is to be used, not only as regards railway companies, but all companies. Take a canal, or a dock, or a harbour company, and suppose the mines are owned by one man, and the surface by another—a very common case in the north of *England*. Now, if the harbour is to be made they will perhaps have to dig down and take some of the minerals away. If they could not give notice to the mine owners they could not make the harbour, or the canal, or the dock. Therefore, in that case it is absolutely necessary that they should be able to take the mines. If, therefore, when the mines are severed they can take the mines, they can take the mines under the powers of the *Lands Clauses Act*. I think that requires no further demonstration. The *Railways Clauses Act* only applies to railways, and it says that “with respect to mines lying under or near the railway, be it enacted as follows:” and then follows the 77th section. If, therefore, the *Lands Clauses Act* enables the railway company to take mines where they are in a different owner from the surface, is there anything in the *Railways Clauses Act* which prevents them from taking them? I think not. On the contrary it says that they shall not be entitled to any mines except only what shall be necessary in the construction of the works, “unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such land unless they shall have been expressly named therein and conveyed thereby.” Therefore, it shews that a company may purchase mines, and may have them conveyed. But it was suggested that the words “expressly purchased” were to be confined to purchase by agreement. I do not know why. The notice is as much express as any agreement. Those words cannot be used to cut down the power given by the *Lands Clauses Act*, which is a power to take the mines when they are in separate ownership. It does not appear to me that they were intended to cut them down, but on the contrary, they recognise that the railway company may purchase if the railway company think fit. Then the 78th section provides for cases where they do not purchase, and then the mine

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owner may work them on giving thirty days' notice, unless the company make compensation. That is not a purchase, and it does not apply to mines which the company may purchase only, but applies to all mines within a certain distance of the railway, whether they are within the limit of the land described or not. It is of much wider application than to the purchase of mines.

That being so, why the railway company should be limited to that mode of acquiring the mines—I can hardly say acquiring, but that mode of preventing the working of the mines—I can see no reason at all. It may be said to be much more convenient to the railway company sometimes when it is raising its capital to buy the mines at once. At other times it may be more convenient to wait until it sees whether the mines will be worked or not. But it seems to me that this section standing, alone, is put in for the protection of the company, not as limiting their power at all, and therefore that it does not really affect the question as to their power to purchase.

The next point was this—having given a notice to take the surface, and having thus severed the ownership, can they buy the mines? It follows from what I have said, that by the ownership being severed, they would have a power to take the mines unless there is something which prevents their taking them. Now, that something can only be the expiration of the time for purchase. There is no law which says that a railway company within the period fixed may not first take three acres and then three acres more from the same landowners, and if mines are included under the word “lands,” why should there be a different law for taking horizontal strata to that which is applied to taking of vertical strata? I see no reason, and, with great deference to the Vice-Chancellor, I think there is no distinction between the severance of ownership of surface land and mines and severance of ownership laterally by taking three acres out of six from the same landowner. I think, therefore, that that objection cannot be supported.

The last objection was this. It was said that the company do not require the mines. As to that I think the observations of Lord Cranworth in *Stockton and Darlington Railway Company v. Brown* (1) are of great value, and they fairly state the mean-

ing of these Acts of Parliament. It is the company who are to be the judges of what they require unless they are not acting *bonâ fide*, and the evidence, and the only evidence required, is the opinion of the surveyor, or engineer, or other officer of the company, unless the other side can shew that they are not acting *bonâ fide*. Now, of course, you can shew want of *bona fides* in two ways. You may shew it by proving that the lands are wanted for some collateral purpose as a fact, or you may shew it by proving that the alleged purpose is so absurd, under the circumstances, that it cannot possibly be *bonâ fide*. As regards the first ground, there was an attempt made here, but it was unsupported by evidence. It was the belief of a gentleman without any facts, and was not admissible in evidence at the trial of the cause. That, therefore, must be put out of the case. The second ground is this. It is said you cannot want the minerals at all, because you can be sufficiently protected by the 78th section. But the answer to that is very simple. The company are the judges whether they would rather have the mines now or wait until someone begins to work them. In this case we have the evidence of the engineer, which is very important. There are no mines, in the ordinary sense, under these lands, at least it is not shewn there are. What are called mines and what are minerals probably within the meaning of the Act of Parliament are some beds of gravel or some beds of clay lying near the surface, and it is said they can only be worked from the surface. As far as I know gravel pits are always open to the surface, I never heard of a gravel pit which was worked as a mine. Of course you may find a stratum of gravel in a mine and bring the gravel to the surface, I am not speaking of that; but I am speaking of working for gravel only—the usual course of working for gravel is to work from the surface. It is the same with clay. There are cases of fire-clay, no doubt, in which it is worked by sinking pits like mines, but ordinary clay is worked from the surface. Therefore, when the engineer says that these strata of gravel and clay will be worked from the surface, that entirely accords with one's ordinary experience. It appears to me perfectly reasonable, although we are told we must consider it quite absurd. If that is so, if they do not buy them, the owner after thirty days' notice may

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break the surface and dig up the gravel and clay. Anything more serious to the owners of the station or the railway can hardly be imagined, and I think it is quite reasonable for them to say, "We want to prevent the risk of such an evil by buying them now, they are necessary for the support of our property and to prevent that property being destroyed; therefore they are required for the purposes of our undertaking." So far from being absurd, so far from being so irrational as to bring to my mind the notion of *mala fides*, it appears to me to be quite rational, quite reasonable, and quite proper. Therefore I think upon this ground also the objection taken on the part of the Plaintiffs ought not to be entertained.

It appears to me, as I have said before, that the only reason given by the Vice-Chancellor is not sufficient in law to maintain the decision and therefore that this appeal ought to be allowed.

BRETT, L.J. :—

In this case the railway company were in possession of the surface of land for the purposes of the railway, and it does not seem to have been questioned, however that land was obtained, that they held it properly for the purposes of their works. Afterwards they gave notice that they required to purchase certain minerals under that land of the surface of which, and of considerably more than the surface, they were the owners. It is objected that they could not give notice to take such minerals for the purpose of compulsorily purchasing them, because there is no power by which they can give a compulsory notice to purchase minerals at all. Secondly, it is said that if they have already given a notice to take the surface—to take the land that is to say—without mentioning the minerals, they have exhausted their power of giving compulsory notice and, therefore, cannot afterwards—having once given notice to take the land, meaning thereby all the land except the minerals under it—give a notice to take the minerals. Whether they can give a notice to take the minerals in the first instance seems to depend upon whether under the *Lands Clauses Act* or their private Act, in conjunction with the *Lands Clauses Act*, they can purchase minerals by compulsion. It is said that there are no words in the *Lands Clauses Act* which

give them that power. If that is true with regard to railways, considering the matter under the *Lands Clauses Act*, then it is true of all other companies with which the *Lands Clauses Act* is concerned. I do not think that anybody has really disputed that the word "lands" in the *Lands Clauses Act*, where it is not a matter of a railway, includes the minerals under the land, so that under the *Lands Clauses Act* it is obvious that they can compulsorily purchase the minerals at the same time that they purchase the land, that is, if they give a compulsory notice to purchase the land, that makes a contract immediately for the purchase of the land including the minerals, and then the minerals as well as the land are valued, and they become the purchasers not only of the lands, but of the minerals as part of the land.

But then in the case of a railway, there is the 77th section of the *Railways Clauses Act*, and then the question is raised whether that does not take away from them the right of purchasing by compulsion minerals at all. Now it seems to me that the 77th section of the *Railways Clauses Act*, is not an enabling section at all. It is a limiting section, or a section of limitation. It says that where a railway company gives notice to take land by compulsion, and afterwards when that land is valued, becomes the purchaser of that land, that is a compulsory purchaser, unless the same should have been expressly purchased, the minerals do not pass by a notice to take the land, and by a conveyance of the land after it is valued. But it seems to me by implication to admit and to acknowledge that if at the time when they give notice to take the land they expressly give notice to take the minerals, then the minerals must be valued with the land just as in all other cases, and they take both the land and the minerals. It seems to me by implication to assume that.

But then it is said although they may do that by agreement yet they cannot do it compulsorily, that is to say, the words "expressly purchased" exclude the idea of a compulsory purchase. In saying that they are "expressly purchased," there is nothing to say they may not be compulsorily purchased equally expressly. In other words when you give the notice to take the land, if in the notice you expressly mention that you mean to take the minerals also, then there is nothing to say that that is not a

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purchase; it is a compulsory purchase, and besides that, it is an express purchase. But even that will not do, because the company must take care, as it seems to me, to see not only that they have given the notice expressly, but that when they take the conveyance, the conveyance must expressly mention the minerals also. But if they do, it is no objection with regard to that section that all that has been done compulsorily. It follows from that, that if they give express notice that they mean to take the minerals, at the time they give the notice to take the surface, or, for it is really not the surface, to take all the land down to the centre, except the minerals, if at the same time they give express notice of their intention to take the minerals also, they may do that by compulsion just as well as by agreement.

Then comes the point upon which the Vice-Chancellor seems to have decided the case, that if they have given their original notice to take by compulsion all the land except the minerals contained in it, and have taken that land without saying anything about the minerals, then they have exhausted their power with regard to that land and with regard to the minerals, and they cannot give a notice to take the minerals. Now the result of such a decision seems to me almost to shew that it could not have been intended, because if that be so you must go this length, that if the railway company has once taken all the land except the minerals contained in it, however absolutely necessary it may be for their safety and for their works that they should be able to touch those minerals and to deal with them, they never can do it except by agreement with the landowner. Why should that be? Why should they not have the same power with regard to that part of the land which is excepted from their first notice as they have with regard to one part of the surface property with which they have not dealt at the time when they gave the compulsory notice as to another part; or, in other words, why should they not have the same power of going down vertically as they have if they spread out laterally? I can see nothing to prevent it. For that purpose that portion of the land which is called minerals is separated from that portion of the land which is not called minerals, and it is true that the minerals there dealt with are below one part and above another part, but separated from it.

Those minerals are still land within the *Lands Clauses Act*, and if they give the notice to take that portion of the land which is called minerals within the limited time for exercising their compulsory power, I can see no reason why they are not to do that, assuming it to be requisite for the purpose of the works, because they have taken the other part of the land already by compulsion which is above those minerals and which is below those minerals.

The 78th section was also relied upon, and it was said that having once taken all the land except the minerals they could not give any notice with regard to the minerals, and could not deal with them otherwise than according to the 78th section. But the 78th section applies not only during the time limited for the railway to exercise its compulsory powers but afterwards. That 78th section applies at all times. It not only applies to the working of minerals under the land where the railway company are already owners of the surface of that land, but to the working of minerals in a man's own land near the railway. Under the 78th section after the compensation has been paid by the railway company the minerals do not belong to the railway company. They continue to be the property of the landowner. The railway company cannot touch the minerals. If all they have done is to pay the compensation under sect. 78, they cannot touch them. It is true that the landowner to whom those very minerals belong cannot touch them, and it is because he cannot touch them that compensation is given to him, but the property in them remains in him. The 78th section therefore would not meet the case which is now under consideration, where the railway having already bought the surface really require the minerals for the purpose of their railway. It was suggested that that never could be so; that they never could want those minerals; that as long as the minerals remained in the land it was impossible that the railway company could want them. But I think it has been shewn that they might want to use them, that they might want to take them out for the purpose of giving increased support to their railway. They may want to use the space occupied by those minerals for the purpose of culverts or otherwise. I agree entirely with the suggestion which was made by Lord Justice *Holker* that they might be under the fair impression that they

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ought to have them left alone for the purpose of the safety of their works which might be in existence or the works which they intended to construct, and that therefore it is impossible to say they may not *bonâ fide* want to use the space occupied by minerals, and that if they do they must purchase them, and it would not be sufficient for their safety, or for any reasonable mode of dealing with their power, to say that all they possibly want with the space occupied by minerals is that the minerals should remain as they are.

Then the only remaining question is the one which Mr. *Archibald*, I think, almost by the course of his argument practically, substantially, and argumentatively admitted was the only point that could be really raised in this case, which was, assuming that if they did *bonâ fide* want the space occupied by the minerals for use they could purchase them, and that they could purchase them after having already purchased the surface without them, he says they are bound to shew they want that space occupied by the minerals, and they must shew that it is absolutely necessary for them, whereas he says their affidavits do not shew it. Now, I cannot think that "required" means "absolutely necessary." "Required" means where the company *bonâ fide* think that they are desirable, and are *bonâ fide* of opinion that they are desirable. I think those cases of the *Stockton and Darlington Railway Company v. Brown* (1) and *Kemp v. South Eastern Railway Company* (2), both of which intended to lay down precisely the same doctrine (for the Lord Chancellor in *Kemp v. South Eastern Railway Company* says it would be wrong to derogate in any way from the principle laid down in the *Stockton and Darlington Railway Company's Case*;) really meant this, that the opinion of the railway authorities is to be the governing matter as to whether the things are for the advantage of the railway, if that opinion is an opinion *bonâ fide* expressed and *bonâ fide* laid before the Court. That seems to me to be the meaning of it. If, for instance, all that they had said in this case had been what Mr. *Baxter* unhappily said in the last paragraph of his affidavit I should have had some doubt. But where the engineer says that it is wanted for the purposes of the railway, and where Mr. *Baxter's* own affidavit says the same thing

(1) 9 H. L. C. 256. *6 June 1882* (2) Law Rep. 7 Ch. 364.

—though, begging his pardon, it was not wanted at all, because whether he said it or not is wholly immaterial, it is what the engineer says which is the important point—where the engineer says that he wants it, unless you can shew that that is an assertion made *malá fide* it is binding upon the Court. And how could you shew that it was made *malá fide*? If you could shew that it was palpably on the face of it absurd, as in the case put by the Lord Chancellor—if the railway engineer were to say, “We want to build a station which shall be according to a plan which we now give you notice of, which would really occupy half an acre, nevertheless I require you to sell me 200 acres,” then as to all but the half acre it would clearly be shewn to be so unreasonable that it could not be *bonâ fide* asked for the purposes of the railway. Of course there are a thousand other cases in which it might appear from the affidavit of the engineer, or from the very requisition, that what he was asking for was so wholly absurd that his requirement must be unreasonable, and then in such a case you would naturally say, “It is not merely because you ask for a thing that you are to have it, because it is apparent that your request is not *bonâ fide*.” But here there is nothing to shew that. It seems to me that the affidavit of the engineer is quite consistent with reason and with a reasonable probability that these minerals are wanted to be purchased for the safety of the works, and if it is obvious that if these minerals are left in the hands of the owner with a right to work them the only way he could work them would be by endangering the surface or using the surface, then it is palpable that it is really for the safety of the works that the company should purchase these minerals.

Therefore, I think, in this case we must disagree with the judgment of the Vice-Chancellor, and disagree with the reasons he has given in support of his judgment.

HOLKER, L.J.:—

The most important question which has been raised in this case is this, whether the railway company during the time limited by the Act of Parliament can take by compulsion the land described within the limits of deviation, and not only the surface of the land but the minerals underneath. Upon that point I had, I

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confess, at first some doubt, but that doubt has been entirely removed during the course of the arguments which have been presented to the Court. It seems to be clear that if the railway company in this case or in any other were acting merely under the powers of the *Lands Clauses Consolidation Act* for the taking of lands they would be entitled to take both surface and minerals compulsorily, because under that Act, or by that Act, the word "land" is to include minerals, and by the Act they are expressly authorized to take the lands. Therefore, if it stood there and there was nothing more, I think it would be beyond all controversy, as my Lord has pointed out, that the railway company might take both the land and the minerals. One may imagine a very good reason why a railway company should not be excluded from the power of taking the minerals. It may be that near a railway station there is a thick bed of clay, or there may be a stratum of minerals, which would very materially interfere with their operations unless they could take it at once, and it may be that there are some minerals under the land which the railway company will traverse by means of their railway which would be of advantage to them, and which if they could take at the outset they could get at a very small, or comparatively small price; but if they have to wait for a considerable time until the mining operations had been carried on they would have to pay a very heavy price for. Therefore one can imagine reasons why it may be of great advantage to the company to be able to take the minerals along with the surface.

Then it being conceded, or it being clear almost to demonstration, that if the *Lands Clauses Act* had been the prevailing Act, and the company had acted upon its provisions alone they could have taken the minerals along with the surface, then comes the question, have they been restricted from so doing, or prevented from so doing, by any legislation? and then the 77th section of the *Railways Clauses Consolidation Act*, 1845, is referred to. The 77th section provides in effect that the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them (it does not confine it to a particular kind of purchase), except such part as may be necessary for their works, unless the same shall have been expressly pur-

chased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby. Therefore, according to this section the minerals will not pass unless they have been expressly purchased. Now the real question is what is the meaning of "expressly purchased?" I cannot see upon consideration any reason to confine "expressly purchased" to "purchased by agreement." The words are just as apt to describe a purchase under compulsory powers as they are to describe a purchase by agreement. Then, if you come to look at the good sense of the thing it is pretty obvious, indeed it is quite clear to my mind, that the section was introduced into the Act of Parliament by the Legislature for the benefit not of the landowner or the mineowner, but of the railway company, because it might be a most disastrous and disadvantageous thing for the railway company to be obliged at once to purchase mines which it never would require for any purpose of the railway. For this reason, and having that result in view, I think the Legislature introduced this section for the very purpose of protecting and benefiting the railway company.

As to the other points which have been dealt with by my Lord, I have nothing more to add.

Solicitors for the Company: *Baxters & Co.*

Solicitors for the Plaintiffs: *A. F. & R. W. Tweedie.*

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Ex parte HALL. *In re* COOPER.

*Fraudulent Preference—Pressure by Creditor—Bankruptcy Act, 1869, s. 92—
Evidence—Service of Copy of Deposition on File—Costs—Bankruptcy Rules,
1870, r. 50.*

236D71 On the 17th of February a trader told one of his creditors that he was about to stop payment. The creditor then pressed for security for his debt, and threatened to commence proceedings against the debtor at once, if he did not fulfil a verbal promise which he had, on the 17th of January, when the debt was contracted, made to supply the creditor with goods, or their equivalent, as security. The creditor had on the 14th of February, before he knew that the debtor was about to stop payment, pressed the debtor for the promised security, and the debtor had then again promised to give it. On the 19th of February the debtor delivered two bills of exchange, accepted by some other firms, to a third person, telling him to hand them to the creditor. On the 24th of February the debtor filed a liquidation petition, and on the 10th of March he was adjudicated a bankrupt:—

Held, that the delivery of the bills of exchange amounted to a fraudulent preference of the creditor, and that it was void as against the trustee in the bankruptcy under sect. 92.

Per JESSEL, M.R.:—Inasmuch as the threat to bring an action could have no influence on a man who was just about to become bankrupt, there was no real pressure exerted by the creditor on the 17th of February, and the prior pressure on the 14th of February, having been ineffectual, could not be taken into account.

A deposition of a witness, taken in the Court of Bankruptcy for one purpose, and filed, may be used against him as an admission in any other proceeding in the matter of the same bankruptcy.

But when a party to an application in the Court of Bankruptcy gives notice to his opponent of his intention to use as evidence on the hearing of the application a deposition which is on the file, though it was originally taken for another purpose, he ought not to serve his opponent with a copy of it, and if he does so, he will not, though successful on the application, be allowed the costs of the copy thus served.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

Arthur Cooper carried on business as a boot and shoe manufacturer at *Leicester*, and for some years prior to 1873 he had had various business transactions with *William Hall*, a boot and shoe manufacturer at *Leeds*. On the 17th of January, 1873, *Cooper* applied to *Hall* to advance him the sum of £700, which *Hall* consented to do on the terms that *Cooper* “should forthwith

supply him with goods, or their equivalent, to cover the advance." No written agreement was entered into, but *Hall* advanced the £700. *Cooper* failed to keep his promise. *Hall* saw him on several occasions, and pressed him to let him have the goods. On the 14th of February, 1873, *Hall* saw *Cooper* in *Leeds*, and insisted on having the goods or their equivalent. The goods, however, were not sent. On the 17th of February, 1873, a Mr. *Chamberlain*, who was *Cooper's* brother-in-law, went to *Leeds* and saw *Hall*. He told him that *Cooper* had sent him, that it was all up with *Cooper*, that he could not go on any longer, and had made up his mind to stop. *Chamberlain* also told *Hall* that he had better go to *Leicester* and see *Cooper*, and get himself put right. The same day *Hall* went to *Leicester* with a Mr. *John Brown*, who was a leather merchant in *Leeds*, and who had had dealings with *Cooper*. They saw *Cooper*, who told them that he was done up, and that his bankers had told him to stop. *Hall* again pressed *Cooper* to perform his promise about the goods, threatening him with instant proceedings if he did not do so, and *Cooper* promised to send the goods. *Hall* returned to *Leeds* on the 18th of February, leaving *Brown* at *Leicester*. *Cooper* did not fulfil his promise of sending goods to *Hall*, but on the 19th of February he gave two bills of exchange to *Brown*, one for the sum of £156 17s. 7d., which was drawn upon and accepted by *Brown's* own firm, the other for the sum of £72, which was drawn upon and accepted by one *Hayes*, requesting *Brown* to hand the two bills to *Hall*. *Brown* afterwards told *Hall* of this, and *Hall* requested *Brown* to hand over the bills to him, but (as the Court of Appeal held upon the evidence) this request was not made till after the 24th of February. *Brown* refused to hand over the bills until *Hall* had paid him for some goods which he had sent him. On the 24th of February, 1873, *Cooper* filed a liquidation petition in the *Leicester* County Court. His creditors determined to make him a bankrupt, and on the 1st of March a creditor presented a bankruptcy petition against him, founded on the filing of the liquidation petition as an act of bankruptcy, and on the 10th of March an adjudication of bankruptcy was made against him in the County Court. On the 11th of June, 1873, *Hall* was, at the instance of the trustee, examined in the County Court

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about his dealings with the bankrupt, and the deposition then taken was afterwards filed. *Brown* was also examined at the instance of the trustee, and in the course of his examination he stated that he had in his possession the two bills which had been given to him by the bankrupt for *Hall*, and ultimately he handed them over to the Registrar of the Court. The Registrar afterwards delivered them to the trustee in the bankruptcy. The bill for £156 17s. 7d. was paid at maturity, and the proceeds were received by the trustee on the 22nd of June, 1873. The bill for £72 was dishonoured, and *Hayes*, the acceptor, became a bankrupt. *Cooper's* trustee received a small dividend on the £72 from the estate of *Hayes*. On the 1st of March, 1881, *Hall* commenced an action against *Cooper's* trustee, claiming payment of £228 17s. 7d., the amount of the two bills, and £94 for interest. The proceedings in the bankruptcy had been meanwhile transferred to the *London* Bankruptcy Court, and on the 12th of July, 1881, an order was made by that Court restraining *Hall* from further proceeding with the action, on the ground that the matter in dispute ought to be tried in the Court of Bankruptcy. *Hall* then applied to the Bankruptcy Court for an order declaring that the two bills were his property, and directing the trustee to pay him the sum of £156 17s. 7d., with interest, and an inquiry as to the damages sustained by him by reason of the trustee having possessed himself of the bill for £72. The Registrar refused the application, on the ground that the delivery of the bills by the bankrupt to *Brown* for *Hall* amounted to a fraudulent preference of *Hall*.

The Registrar's order was founded upon affidavits made by *Hall* and *Brown* and the trustee, "and the transcript of the shorthand writer's notes of the examination of *Hall*" taken in the County Court. The trustee had given notice to *Hall* that he should read this examination (that of the 11th of June, 1873), in opposition to the motion, and had served a copy of the examination upon him.

Hall appealed from the Registrar's order.

Horton Smith, Q.C., and *Russell Roberts*, for the Appellant :—

The deposition of *Hall* was not taken for the purpose of the

present application, and the trustee is not entitled to use it merely because it happens to be on the file of proceedings.

[JESSEL, M.R.:—Any statement made by a man on oath may be used against him as an admission.]

In *Hemming v. Maddick* (1) it was held that a statement made by a witness, not on oath, but which was taken down in writing at the time and signed by him, could not be used to contradict an affidavit afterwards made by him, he not having been cross-examined.

[JESSEL, M.R.:—If you wanted an opportunity of giving an explanation you might have asked to have the witness called and examined in chief.]

As to the alleged fraudulent preference, the delivery of the bills by the bankrupt was not voluntary; it was made in consequence of the pressure by *Hall* on the 14th of February as well as the pressure on the 17th of February. Even if the bankrupt was actuated by a mixed motive, the transaction will be supported. It is sufficient that the delivery of the bills was not purely voluntary. The old law as to fraudulent preference has not been altered by the *Bankruptcy Act*, 1869: *Ex parte Tempest* (2); *Ex parte Topham* (3). There Lord Justice *Mellish* said, "The principle of the decision in *Ex parte Blackburn* (4) was that the law of fraudulent preference was not altered by the Act of 1869, and the law before the Act was that, however desperate the circumstances of a debtor were, and although the creditor knew them to be desperate, the creditor is not debarred from pressing his debtor for payment; and if he did so press, and payment was made, such payment was not a fraudulent preference."

[LINDLEY, L.J.:—Did you ever assent to take the bills as an equivalent for goods before the act of bankruptcy was committed?]

The Appellant has claimed them throughout, and his evidence shews that he accepted them.

[JESSEL, M.R.:—The pressure must be a real *bonâ fide* pressure.

(1) Law Rep. 7 Ch. 395.

(3) Law Rep. 8 Ch. 614, 620.

(2) Ibid. 6 Ch. 70.

(4) Ibid. 12 Eq. 358.

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Here it was all a sham. What pressure can be produced on a man who is going to become bankrupt in a week by your telling him you will bring an action against him? It might be different if the creditor did not know the state of his affairs.]

There was the utmost pressure which the creditor could use. If a man does all that he can that is real pressure, and it was *bonâ fide*, for every man wishes to be paid a debt which is due to him. The law will not dive into secret motives. A man is not incapacitated from dealing with his property until he has committed an act of bankruptcy. In order that a preference may be fraudulent it must at any rate be fraudulent on the part of the creditor, if not on the part of both parties. And a creditor who receives notice of his debtor's intention to commit an act of bankruptcy is not bound to inquire whether the act has been committed, but is entitled to avail himself of his remedies just as if he had received no such notice: *Ex parte Arnold* (1)

Winslow, Q.C., and *McDonell*, for the trustee, were not heard.

JESSEL, M.R.:—

This case reminds me of one in which I likened the Plaintiff's case to a colander, because it was so full of holes. The first point, and one which is quite fatal to the Appellant's case, is this: The bargain which he made with the bankrupt on the 17th of January was, that the bankrupt should forthwith supply him with "goods, or their equivalent," as security for the advance of £700. On the 19th of February the bankrupt sent him two bills of exchange in fulfilment of the bargain. They might be good bills or bad bills, but the Appellant was not bound to accept them as an equivalent for goods, and, until he did so accept them, the property in the bills remained in the bankrupt. The act of bankruptcy was committed on the 24th of February, and it is incumbent on the Appellant to shew that he had accepted the bills as an equivalent for goods before that day, for afterwards he could not accept them, because the property in them had vested by relation in the trustee in the bankruptcy. In the evidence on the point there is an entire absence of dates, but I think the fair

inference is that the Appellant did not demand the bills from *Brown* until after the 24th of February. But, whether that be so or not, the *onus* is upon the Appellant to prove that the property in the bills had vested in him before the 24th of February, and he has not discharged that *onus*. This point is enough to dispose of the case. But I agree with the Registrar that, even if the property in the bills had passed to the Appellant before the 24th of February, the delivery of them by the bankrupt to *Brown* for him constituted a fraudulent preference. The bankrupt was pressed by the Appellant on the 14th of February to give him the security which he had promised, but he did not give it. On the 17th of February *Chamberlain* went to see the Appellant, and told him that the bankrupt was about to stop payment. Thereupon the Appellant went to *Leicester* to see if he could not get some security from the bankrupt. There he was again told by the bankrupt that he was about to stop. He endeavoured to obtain some security from him, but he failed, though he says he told the bankrupt that he should bring an action against him instantly if he did not perform his promise of the 17th of January. Then the Appellant went back to *Leeds*, and, after he had gone away, the bankrupt delivered the two bills to *Brown*, requesting him to hand them over to the Appellant. Can that delivery of the bills to *Brown* be said to have been made in consequence of *bonâ fide* pressure on the part of the Appellant? It is plain that it was the voluntary act of the bankrupt. It appears to me that it would be absurd to call it pressure. A man says to his creditor, "I am about to become bankrupt, or I shall stop payment in a week." The creditor says, "Pay me my debt, or I will sue you for it." Can that be called *bonâ fide* pressure by the creditor? When you consider the matter, it seems to me that it would be absurd so to call it. And that is exactly what occurred in the present case. Of course it would be an entirely different matter if the creditor did not know of the state of his debtor's affairs. It is suggested that there was pressure by the creditor on the 14th of February, but it is plain that that pressure had produced no effect. Therefore, on this ground also, the appeal fails. And though the point has not been argued, I think that the *Statute of Limitations* would also be an answer to the Appellant's demand.

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His application is in the nature of an action of trover, and more than eight years have elapsed since the bills were converted by the trustee. I do not at present see any answer to the statute. The appeal must, therefore, be dismissed with costs.

BAGGALLAY, L.J. :—

If the Appellant ever had any right to the bills he had the right in the year 1873, and his delay in asserting it if unexplained appears to me to be a complete answer to the present application. But it is possible that this delay might be explained. I am, however, of opinion that it has not only not been proved that the Appellant accepted the bills as an equivalent for goods before the 24th of February, but the evidence almost satisfies me that he did not so accept them until after the 24th of February. I agree also that the delivery of the bills was as clear a fraudulent preference as can be imagined.

LINDLEY, L.J. :—

I am of the same opinion.

The first point is whether the bills ever became the property of the Appellant, and if so, when did they become his property? The evidence on this point appears to me decidedly adverse to him. What was an equivalent for goods could not be determined by the bankrupt; it could only be determined by the Appellant. Instead of sending goods the bankrupt sent bills to him by *Brown*. Until the Appellant knew of this there was a mere revocable authority to *Brown* to hand over the bills to him. It is for the Appellant to prove how and when the bills became his property. He is bound to shew an assent to their being appropriated to the fulfilment of the bankrupt's bargain with him. There is no sufficient evidence of any such assent having been given before the act of bankruptcy. If I were to speculate, I should say that the Appellant never did assent until after the 24th of February.

As to the fraudulent preference, I am disposed to think that the view taken by the Master of the Rolls is right. It is quite clear that the transaction is within the first part of sect. 92. The question is whether it falls within the proviso at the end. I doubt much, whether the Appellant was "a purchaser, payee, or incum-

brancer in good faith and for valuable consideration," having regard to the intimation which he had received of the state of his debtor's affairs. I say nothing about the *Statute of Limitations*. But the first point is fatal to the Appellant's case, and I am not at all disposed to differ from the Registrar on the other points.

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Winslow:—We are entitled to the costs of the copy of the shorthand writer's notes of the deposition of the Appellant, which we served on the Appellant as part of our evidence. We intended to use this deposition as an affidavit on our behalf, and we were bound to give the Appellant notice of this, and to serve him with a copy; Bankruptcy Rules, 1870, rules 49, 50.

[JESSEL, M.R.:—The deposition was not an affidavit within rule 50; it was already on the file.]

The decision in *Earl de la Warr v. Miles* (1), does not apply. The notes were not taken for the purposes of this application. We ask also for the costs of copies of the deposition supplied for the use of the Respondent's counsel.

Horton Smith:—The Respondent ought not to have served us with a copy of the deposition; only parts of it were material, and we could have taken a copy of the material parts from the file.

JESSEL, M.R.:—

The copy of the deposition which is on the file was not made for the purposes of the appeal, and therefore the costs of making it are not within our jurisdiction. As regards the service of a copy of the deposition on the Appellant, I am extremely loth to recognise any such practice. Notice of the intention to use any document which is already on the file ought to be sufficient. The party to whom the notice is given can go and look at it and make extracts of such parts as are material, or it might happen that he had already taken a note of the deposition. We ought not to sanction any such practice of serving copies of long examinations. With regard to the costs of the copies of the deposition which were supplied for the use of the Respondent's counsel, I think that

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in the present case those costs should be allowed. It must not be supposed that we should in all cases allow such costs; we might in some cases allow only the costs of making extracts. But, in the present case, I think it was reasonable to supply copies for the use of counsel.

BAGGALLAY, L.J., and LINDLEY, L.J., concurred.

Solicitors for Appellant: *Hamlin & Grammer*, agents for *B. C. Pullan, Leeds*.

Solicitors for Respondent: *Munns & Longden*.

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Feb. 6.

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Ex parte RUSSELL. *In re* BUTTERWORTH.

Voluntary Settlement—Trader—Intent to delay Creditors—Bankruptcy Act
(32 & 33 Vict. c. 71), s. 91—13 Eliz. c. 5—*Costs—Trustees*.

In determining whether a trader who has executed a voluntary settlement was, within the meaning of sect. 91 of the *Bankruptcy Act*, 1869, "at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement," the value of the implements of his trade and of the goodwill of his business is not, if he was intending to continue his business, to be taken into account.

At any rate, if that value is to be taken into account, it can only be such a value as would be realized at a forced sale.

Per Lindley, L.J.: It is essential that the settlor should be able to pay his debts in the way in which he is proposing to pay them, *i.e.*, in the ordinary course of his business, if he is proposing to continue it.

A trader, who had for many years carried on the business of a baker, and had saved some money, being about to purchase a grocery business, which he intended to carry on in addition to the other, made a voluntary settlement of the bulk of his property for the benefit of his wife and children. He afterwards bought the grocery business, and carried it on for about six months, but lost money by it. He then sold it for as much money as he had given for it, and afterwards carried on the baker's business alone, until, about three years after the execution of the settlement, he filed a liquidation petition, his liabilities largely exceeding his assets. The debts which he owed at the date of the settlement had been all paid:—

Held, that, independently of the question whether he was solvent at the date of the settlement, the settlement was void as against the trustee in the liquidation under the statute 13 Eliz. c. 5, on the ground that it was evidently executed with the view of putting the settlor's property out of the

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reach of his creditors in case he should fail in the speculation on which he was about to enter in carrying on a new business of which he knew nothing.

Mackay v. Douglas (1) approved and followed.

Held, also, that, under the circumstances, the settlement was void against the trustee in the liquidation under sect. 91 of the *Bankruptcy Act*, 1869.

Decision of *Bacon*, C.J., reversed.

The Judge of the County Court set aside the settlement. He gave the trustee in the liquidation his costs out of the debtor's estate, but made no order as to the costs of the trustees of the settlement. The trustees of the settlement appealed to the Chief Judge, who discharged the order of the County Court. The Court of Appeal restored the order of the County Court.

Held, that the trustees of the settlement ought to have been satisfied with the decision of the County Court, and that they must bear their own costs of both appeals, and must pay the costs of the trustee in the liquidation of both appeals.

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CHARLES BUTTERWORTH carried on the business of a baker in *Manchester*. He had carried it on for some years, and had saved money, which he had invested in the purchase of some freehold houses. On the 8th of August, 1878, he made a voluntary settlement, by which he conveyed the houses, and also assigned the furniture and other household goods in his dwelling-house (which was a different house from his shop), to trustees, upon certain trusts for the benefit of his wife and children. The deed contained a recital that "the settlor is now in a solvent position and capable of paying his debts as they become due." When he consulted his solicitor about making the settlement, the solicitor told him that it would be worthless, unless he was able to pay the debts which he then owed, independently of the property which was to be included in the settlement. He then drew up a statement in writing of his assets (independently of the property which he proposed to settle) and of his liabilities. This statement was as follows:—

| Assets. | | | | | | |
|----------------------------|---|---|---|---|---|-----|
| Cash | . | . | . | . | . | £25 |
| Hand cart | . | . | . | . | . | 7 |
| Working utensils | . | . | . | . | . | 40 |
| Fixtures | . | . | . | . | . | 20 |
| | | | | | | — |
| | | | | | | £92 |
| | | | | | | — |

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|-----------------|---------------------|--------------|--------|
| 1882 | <i>Nelstrop</i> | | £23 10 |
| <i>Ex parte</i> | <i>Charles Holt</i> | | 16 5 |
| RUSSELL. | <i>McDougall</i> | | £19 0 |
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| BUTTER- | | | £58 15 |
| WORTH. | | | <hr/> |

At the time when the settlement was executed *Butterworth* was about to purchase a grocer's business, which he intended to carry on in addition to his baker's business. He made the purchase in September, 1878, paying £90 for the goodwill and fixtures. He lost money in this business, but he carried it on till April, 1879, when he sold the goodwill and fixtures for as much as he had given for them. He then continued to carry on the baker's business alone.

On the 25th of July, 1881, he filed a liquidation petition in the *Salford* County Court, and in his statement of affairs he estimated his liabilities at £1158. The trustees in the liquidation applied to the County Court for an order declaring the settlement void as against them, either under sect. 91 of the *Bankruptcy Act*, 1869, or under the Act 13 Eliz. c. 5. One of the trustees in the liquidation was examined, and stated that the debtor's estate had realized up to that time about £210, and that the only assets remaining to be realized were some book debts, which he did not think were worth more than £10 or £15. He also stated that he had sold the debtor's utensils and fixtures in his shop to the incoming tenant, who took the shop, the utensils for £6 13s. 4d., and the fixtures for £5 15s. 9d. The utensils were very old, the debtor having been in business for nearly twenty years. The sale was made by auction at the shop, and the auctioneer said in examination, "The utensils had been in use for a time. Some few of them had been replaced. They were such as we should expect to find in a shop that had been in operation," He added that he considered that he had got a fair price for them. Evidence was given that the value of the real estate comprised in the settlement was £1040. It was also proved that at the date of the settlement the settlor owed other trade debts (in addition to those mentioned in the statement which he gave to his solicitor) amounting to £52 10s. It also appeared that he had some flour, worth

£19 10s., which he had not included among his assets. The debts due at the date of the settlement had been paid before the filing of the liquidation petition. The Judge held upon the evidence that, at the date of the settlement, the settlor was able to pay his debts without the aid of the settled property, inasmuch as he was entitled to assume that his trade debts, though then due, were not in the ordinary course of business then payable, it having been the custom of his trade creditors to allow him a month's credit. His Honour declined to express any opinion whether the deed was void under sect. 91 of the *Bankruptcy Act*, but he held that it was void under the statute of *Elizabeth*, because the settlor thereby withdrew from his creditors the only means whereby he could have carried on the grocer's business, so that the creditors should not lose in the event of that business not proving successful. An order was accordingly made declaring the deed void as against the trustees in the liquidation. The costs of the trustees in the liquidation were ordered to be paid out of the debtor's estate, but no order was made as to the costs of the trustees of the settlement.

The settlement trustees appealed to the Chief Judge.

The appeal was heard on the 16th of January and the 6th of February, 1882.

Winslow, Q.C., and *E. Cooper Willis*, for the Appellants:—

The only effect of the 91st section upon the statute of *Elizabeth* is to alter the *onus* of proof. Whether or not there was an intention to injure creditors is inferred from the same kind of evidence under either statute. It must be shewn that the settlor was insolvent. If he can pay all his debts without the aid of the property in the settlement, he has as much right, though a trader, to make a settlement as anybody else. That is the only issue in this matter.

In *Jackson v. Bowley* (1) a creditor impeached a voluntary settlement, suggesting fraud on the ground that the testator was insolvent when he made the assignment. Mr. Justice *Erskine* in summing up said, "The question is, what is meant by insolvency? If by the act of assignment the party makes himself insolvent—

(1) Car. & M. 97, 103.

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that is, if the property left after the conveyance is not enough to pay his debts—that is insolvency sufficient for the purposes of the Plaintiff in this action.” This is the test which is applied by the *Bankruptcy Act*, 1869, to voluntary conveyances; *May* on *Fraudulent Conveyances* (1). The learned County Court Judge seems to have rested on *Mackay v. Douglas* (2). But if the law as there stated is to prevail in every case, the result will be, that no settlement made by a trader can be good. Every trade must to some extent be of hazardous character.

The general proposition which is to be derived from *Mackay v. Douglas* is only this—that the *onus* lies on the settlor to shew he was solvent at the time. There is, indeed, an advance upon this doctrine in *Spirett v. Willows* (3), namely, that where the result of the settlement has been to delay, though not ultimately defeat, payment of a creditor, the settlement is bad—a decision followed, though with reluctance, by Vice-Chancellor *James* in *Freeman v. Pope* (4). Here we have no creditor delayed by reason of the settlement.

The debtor was justified in excluding current business debts from his list of liabilities: *Lush v. Wilkinson* (5). Mere evidence of an existing debt is not sufficient; actual insolvency must be proved: *Skarf v. Soulby* (6).

Marten, Q.C., and *Jordan*, for the Respondents, the trustees in the liquidation :—

The deed is void both under the statute of *Elizabeth* and under the *Bankruptcy Act*.

[BACON, C.J.:—What jurisdiction has the Court of Bankruptcy under the statute of *Elizabeth*? The trustees can bring an action.]

Marten, in continuation :—

At any rate, the Court has ample jurisdiction under sect. 91.

As to the items in the statement furnished to the solicitor; there is no evidence that the debtor had £25 in cash beyond his

(1) Page 38.

(2) Law Rep. 14 Eq. 106.

(3) 3 D. J. & S. 293.

(4) Law Rep. 9 Eq. 206, 210.

(5) 5 Ves. 384, 387.

(6) 1 Mac. & G. 364, 375.

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own statement; as to the value of the utensils and fixtures, no evidence as to value beyond the debtor's word; when sold in 1881, they realized only £12 9s. 1d., having been valued by the debtor at £60. So that he has failed to discharge the *onus* of proof. Then as to the flour said to have been in stock, there is no evidence to shew that the debtor had any stock unused on the 8th of August, 1878. What the evidence does shew is, that he was short of stock, and was daily using the flour which had been ordered.

Freeman v. Pope (1) is a clear decision in our favour. So are *Crossley v. Elworthy* (2); *Mackay v. Douglas* (3); *Taylor v. Coenen* (4); *Ex parte Huatable* (5); *Ex parte Stephens* (6).

The circumstance is full of suspicion that this debtor, having made one statement to his solicitor in August, 1878, afterwards comes forward and says that what he said on the former occasion was defective and untrue.

BACON, C.J.:—

It is imputed to the debtor that he has fallen within the provisions of the 91st section, and the *onus* is on him to shew that at the time when he executed this settlement he was able to pay all his debts without taking into account the value of the property included in the settlement.

Now, how does the case stand as to this? The deed recites plainly that the settlor is able to pay all his debts as they become due. The solicitor who prepared the deed took the proper precaution of asking the debtor whether he was in a position to make such a settlement. The debtor assured the solicitor that he was. Upon that occasion he made a statement which the solicitor took down in writing, and which the debtor now says was an imperfect statement. Is there anything unreasonable or remarkable in that? Take it that he did represent to the solicitor that this was the state of things at the time, he is not bound by that statement. It has been contended, however, by both the learned counsel for the Respondent, that the statement as to the value of the stock,

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(1) Law Rep. 9 Eq. 206.

(2) Ibid. 12 Eq. 158.

(3) Ibid. 14 Eq. 106.

(4) 1 Ch. D. 636.

(5) 2 Ch. D. 54.

(6) 3 Ch. D. 807.

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furniture, fixtures, and so on, was obviously incorrect and untrue. How is that proved? It is proved, first, by the fact that the debtor was having stock from time to time from various millers, and that he was urgent to get the stock because he wanted it directly. Further, it is shewn that the chattels, furniture, and tools, after having been in use for nearly three years from the date of the settlement, did not fetch as much as the debtor had set down as their value at the time. How can that be shewn to have been a falsehood? Another objection is that the debtor says he had £25 in his pocket. How is that disproved? No fact is suggested from which a contrary inference ought to be drawn. If the debts to the millers be added to the debtor's liabilities at the time, he must have credit, on the other hand, for the stock he had not then consumed. No debt that was in existence at the date of the settlement, is in existence now, or has been in existence for years past. There is no suggestion of fraud; and the learned Judge has found explicitly that the requirements of the 91st section have been complied with, and that that section has no application to the case.

The learned Judge took another view of the subject, and based his jurisdiction upon the statute of *Elizabeth*. Assuming that he was right in going into that question, how does it stand? No doubt a conveyance which has for its object to defeat and delay creditors is a fraud. But there is no evidence in the case to justify the inference that this settlement was fraudulent. The debtor went on with his trade uninterruptedly; there were no clamorous creditors—no applications for money which were rejected—no distress of any sort. He had the misfortune to buy a grocer's business, which failed, and he sold it again for as much as he gave for it. There is no fact from which I can infer a disposition to injure creditors.

The case of *Crossley v. Elworthy* (1) has been referred to. But each case must be decided after all the facts have been taken into consideration, and there is no trace here of a demand by any creditor not having been complied with. In *Mackay v. Douglas* (2) the settlor was up to his head in speculation. He had entered into a variety of transactions not yet ripe, and which, if they were

(1) Law Rep. 12 Eq. 158.

(2) Law Rep. 14 Eq. 106.

to conclude one way, would involve great loss, if not ruin. That case has no resemblance to the one before me.

Taylor v. Coenen (1) was a very gross case. The settlor was over head and ears in debt. He was in debt when he assigned the policies of assurance; and he was still more deeply in debt when he assigned the other property. There is no resemblance in these cases to the case before me.

This debtor was carrying on a trade, owing debts, and having the means of paying them. He makes a settlement on his wife and children. Who has been injured by the settlement? No one who was then a creditor has been injured. I am at a loss to find any ground upon which the second part of the learned Judge's decision can be rested. If I adopt his conclusion that the case is not within the 91st section, nothing more can be said about it. If it is not within the 91st section it is nowhere.

I think the order cannot be sustained; and it must be discharged with costs, both in this Court and in the Court below.

J. B. D.

From this decision the trustees in the liquidation appealed. The appeal was heard on the 23rd and 24th of February, 1882.

Marten, Q.C., and *Jordan*, for the Appellants:—

The evidence shews that at the date of the settlement the debtor was not able to pay his debts without the aid of the property comprised in it. It is, therefore, void under sect. 91 of the *Bankruptcy Act*, 1869 (2). It is also void under the statute of *Elizabeth: Mackay v. Douglas* (3).

(1) 1 Ch. D. 636.

(2) Sect. 91 provides that. "Any settlement of property made by a trader not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of such settlement, be

void as against the trustee of the bankrupt appointed under this Act, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee."

(3) Law Rep. 14 Eq. 106.

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Winslow, Q.C., and E. Cooper Willis, for the trustees of the settlement :—

Both the County Court Judge and the Chief Judge have found that the settlor had sufficient assets, independently of the settled property, to pay his then existing debts. That is a finding of fact which this Court will not disturb.

[JESSEL, M.R.:—That rule does not apply when there is no conflict in the evidence.]

The debts existing at the date of the settlement have been all paid, and the goodwill of the baker's business ought to be taken into account as an asset. The decision of the County Court Judge was based on the statute of *Elizabeth*, and it comes to this, that though a man is perfectly solvent, and he makes a settlement of his property, leaving out of the settlement sufficient to cover all the debts which he then owes, yet, if he is about to enter into trade, he must be taken to have contemplated incurring debts, and therefore to have intended to defeat his future creditors, and consequently that the settlement is void. The statute of *Elizabeth* does not go to that extent: *Crossley v. Elworthy* (1).

In any event, the costs of the trustees of the settlement ought to be allowed out of the fund. It was their duty to defend the settlement.

JESSEL, M.R. :—

This is an appeal from a decision of the Chief Judge in Bankruptcy, reversing a decision of the Judge of the *Salford* County Court. The County Court Judge set aside the settlement as being fraudulent under the statute of *Elizabeth*, but he gave no opinion whether it was liable to be set aside under the 91st section of the *Bankruptcy Act*. The Chief Judge was of opinion that the settlement was not liable to be set aside on either ground.

The case is now before us. It has been very carefully discussed and fully argued, and I am bound to say I think that the settlement is liable to impeachment on either or on both grounds.

The debtor carried on the business of a baker (it was not a large

(1) Law Rep. 12 Eq. 158.

baker's shop) in *Manchester*, and it appears to have been a tolerably prosperous business up to August, 1878. The debtor had saved money, and had invested money in the purchase of some houses. He also had some furniture in his private residence, which was different from the shop. That being the position of matters, he contemplated taking a grocer's shop in the neighbourhood and embarking in the business of a grocer, and he actually purchased that business within a month after the execution of the settlement which I am about to mention. He goes to his solicitor in August, 1878, and says that he wants to settle his property on his wife and children. The solicitor very properly tells him that the settlement will be good for nothing unless he is able to pay his debts irrespective of the property to be settled, and thereupon the debtor drew up a statement of his affairs, shewing that he had assets sufficient to enable him to pay his debts irrespective of the property to be settled, and the solicitor, being satisfied, drew up this voluntary settlement, which was duly executed on the 8th of August, settling in fact substantially the whole of the debtor's property, worth something like £1500. I will now read what, according to his own statement, he kept out of the settlement, he being engaged in the business of a baker and contemplating entering into the business of a grocer. [His Lordship read the above statement.]

Now, I do not wish to cast any reflection on the solicitor: solicitors are not necessarily very good business men. But I must say that, if that statement had been made to me, I should have said that the settlor had not kept out of the settlement assets sufficient to enable him to pay all his debts without the aid of the property comprised in the settlement.

According to the statement the debts due were £58 15s. Is a man who has got working utensils in his business, fixtures, &c., which are not available except by a forced sale, the total being worth £92, including £25 in cash, able to pay £58 15s.? I should say on the face of it that his assets are not sufficient. A man is not able to pay his debts because he has some odds and ends which can possibly be sold, and on which he puts a fancy value. Therefore, without going into the details, I should not be satisfied with this statement as satisfying the requirements of

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sect. 91. But, when we come to the evidence, we find that, instead of owing £58 15s., he really owed £111. We find also that, in addition to the assets which he mentioned, he had some flour, which, according to the evidence, could not be worth more than £19 10s. On the other hand, the hand cart has disappeared, and whether it was worth £7 or 7s. nobody knows. The working utensils and fixtures were sold about three years after the date of the settlement for a little over £12, instead of £60, and it is in evidence that they fetched a fair price. It is said they may have been worn to some extent during the three years. But the evidence shews that they were very old indeed in 1878, and there is nothing to shew that they afterwards deteriorated in value. In fact I suppose they were so old that they could not very well deteriorate, but they might have required some repair. The result, therefore, is, that to meet the £111 you have £56 or thereabouts in assets, and it is plain, therefore, that the requirements of the 91st section were not complied with.

It is suggested, however, that the goodwill of the baker's business was worth something. I daresay it was; but can that be called an available asset when a man is carrying on his trade? Is he able to pay all his debts because he might possibly, after the lapse of a considerable time, sell the goodwill of his business? The debts were presently payable. How can a man be said to be able to pay his debts because he has a business the goodwill of which he may be able to sell? It is quite plain that that is not an asset which ought to be reckoned within the purview of this section. Therefore it appears to me clear that the settlement is void under the 91st section.

As regards the other point it is not absolutely necessary to decide it, but I think that the County Court Judge was right. The principle of *Mackay v. Douglas* (1), and that line of cases, is this, that a man is not entitled to go into a hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: "If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss." That is the very thing which the statute of *Elizabeth* was meant to prevent. The object of the

(1) Law Rep. 14 Eq. 106.

settlor was to put his property out of the reach of his future creditors. He contemplated engaging in this new trade and he wanted to preserve his property from his future creditors. That cannot be done by a voluntary settlement. That is, to my mind, a clear and satisfactory principle.

Now, as I understand the evidence in this case, the baker did very well as a baker, and probably he may not have recollected the old proverb *ne sutor ultra crepidam*. When he went into business as a grocer he was going into a business which it appears he did not understand, and it is obvious that the object was—(I am taking that as a fair inference—) to save his property for his wife and children in case the new business did not succeed. Well, that actually happened. The new business did not succeed; he lost money by it, and it probably brought him to bankruptcy.

His object was, as I have said, to make himself safe against that eventuality, and, if that was his object, then I think the principle of *Mackay v. Douglas* (1) applies, and that the deed was void also under the statute of *Elizabeth*. But, as I have said before, it is not really necessary to decide this point, because I am clearly of opinion that the deed is void under the 91st section of the *Bankruptcy Act*.

BAGGALLAY, L.J. :—

I am of opinion that the settlement is void under the provisions of the 91st section of the *Bankruptcy Act*. By that section a heavy burden is cast upon persons making settlements of this kind. Under any circumstances it would be a difficult thing, even after the lapse of only three or four years, for the persons beneficially interested in a settlement to shew that the settlor was at the date of its execution able to pay his debts without having recourse to the settled property, and the difficulty, of course, becomes greater as the time grows longer. The section extends to a period of ten years, and consequently every prudent solicitor who is applied to by a client to prepare a voluntary settlement under such circumstances, would endeavour, as far as he could, to retain some record or other materials which would shew at any future time, if the settlement was impeached, that the settlor

(1) Law Rep. 14 Eq. 106.

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was able at the time when he made it to meet all his debts without the aid of the settled property. In the case with which we are dealing the solicitor appears to have taken that course. It was of course a prudent step to take, and it was one which might have been of very great use if the settlement had remained longer unimpeached. But now what has happened? Some three years after its date the settlement is impeached. The burden of proof is upon those who claim under the settlement to shew that the settlor's assets (other than those included in the settlement), were sufficient to meet his debts. Upon the face of the memorandum, if it had been accurate, there were assets to the amount of £92 to meet debts to the extent of £58, but it is now admitted that the statement was inaccurate. In the first place, the debts put down at £58 were admittedly £111. Therefore, they in fact exceeded even the estimated amount of the assets. The assets, again, were materially overstated, and though put down at £92 they were, if the evidence is to be relied upon, really not worth more than £37.

Well, what is the way in which those who support the settlement endeavour to get over this? "Oh," they say, "there were other assets besides those comprised in the statement." They say that there were so many sacks of flour that should be taken at a certain price. I am by no means satisfied upon the evidence that those sacks of flour were in the place at the time. On the contrary, in my opinion, there was not anything like a sufficient quantity of flour to bring the assets up to an amount sufficient to cover the liabilities. All the circumstances, when they are inquired into, militate against the statement that there was a considerable amount of flour in the settlor's possession at that time. And another still stronger observation is this—Why was not the flour referred to in the statement of assets, if there existed any flour really available? I have come to the conclusion that those upon whom the burden is cast of shewing that there were sufficient assets have failed to sustain it, and therefore the condition, the performance of which would alone entitle the Respondents to uphold the settlement, has not been performed, and sect. 91 consequently applies. I think also that, having regard to all the circumstances of the case, the County Court Judge was

right in holding that the settlement was void under the statute of *Elizabeth*, but I prefer to rest my decision upon the effect of the 91st section of the *Bankruptcy Act*.

LINDLEY, L.J. :—

I am of the same opinion. It appears to me that the view taken by the County Court Judge was right, that this settlement was void under the statute of *Elizabeth*. I differ from the Chief Judge in the view which he took of the circumstances under which the settlement was executed. The settlement was executed by a baker, who had been a thriving and prosperous man. He had saved money. He could pay all his debts. Substantially, he had plenty of assets, but he was going to take a grocer's shop. He knew nothing of a grocer's business. He was perfectly aware that entering upon a business to which he had not been brought up was a risky thing, and, therefore, he made a settlement, settling substantially the whole of his property upon his wife and children. What was that for? Obviously, not simply to benefit his wife and children, but to screen and protect them against the unknown risks of the new adventure.

It appears to me that this is plainly within the principle of *Mackay v. Douglas* (1), one of the most valuable decisions that we have on the statute of *Elizabeth*. On that short ground, I think that the settlement is plainly void.

I also think the settlement falls within the 91st section of the *Bankruptcy Act*. When we look at the words of that section, and have to consider whether a man is able to pay his debts, we must not merely look at the amount of his assets and liabilities, but we must consider the position which he is assuming. If, for example, this baker had been retiring from trade, of course we must have taken into account all his pots and shovels, the goodwill of his business, and everything else; all those things would be the means of paying his debts. But, if he is going on with his baker's business, it appears to me idle that we should take such things into account as assets. He must be able to pay his debts in the way in which he proposes to pay them, that is by continuing his business. That is the fair way of looking at it, and I am

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satisfied that he could not pay his debts and also carry on his business with the property left unsettled.

Marten :—The order of the Chief Judge will be discharged, and I ask for the costs here and before the Chief Judge.

JESSEL, M.R. :—I think that is reasonable. In the County Court the trustees might fairly say, “ We want a decision about the settlement,” but, having had a decision, if they choose to appeal, they must take the consequences.

Winslow :—Will your Lordships order them personally to pay the costs ?

JESSEL, M.R. :—Of course. The costs here and before the Chief Judge, not in the County Court.

Winslow :—The County Court Judge did not give the trustees of the settlement their costs out of the estate. He left them to pay their own costs. I submit that in a case of this sort they did only what was right in defending the settlement.

JESSEL, M.R. :—It is a hard case on the trustees, but, on the other hand, you are asking for costs out of other people’s property. You ought to have been satisfied with the decision of the County Court. It is a hard case, but the result will be this, that a man will be very slow to accept the trusts of a voluntary settlement.

Solicitors for Appellants: *Pritchard, Englefield, & Co.*, agents for *J. J. Lambert, Manchester*.

Solicitors for trustees of the settlement: *Stackpoole & Son*, agents for *Burton, Manchester*.

W. L. C.

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Infant—Gift of Personal Estate—Influence.

In the absence of proof of the exercise of control or influence on the part of the donee, or of the existence of the relation of guardian and ward between the donee and the donor, a gift of her property within a month before her death by an infant aged twenty, of business habits, firm will, and fully capable of managing her own affairs, to a relative with whom she had been residing from her father's death, for a period of five months until her own death, is not invalid.

THIS was an action by the legal personal representative of *Ann Totherick*, who died under twenty-one on the 23rd of August, 1880, for the purpose of setting aside, on the ground of undue influence and the absence of independent advice and assistance in the matter, certain gifts of personal estate made by *Ann Totherick* shortly before her death to the Defendants, Mr. and Mrs. *Johnston*, in whose house she was at the time living.

John William Totherick, the father of *Ann Totherick* (who was born on the 11th of May, 1860, and his only child), was a master mariner living at *South Shields*, and the Defendant Mrs. *Johnston* was his niece. On the 17th of March, 1880, *Totherick* left *South Shields* to join his ship at *Bristol*, where, on the 25th of March, he died suddenly.

Before leaving he asked Mrs. *Johnston* to take charge of his house, and to stay with his daughter *Ann Totherick*, who was in delicate health, as a companion during his absence, and on the 24th of March, while on his death-bed at *Bristol*, and unable to alter his will, he signed a document requesting his bankers to pay the money he had at their bank to *Ann Totherick* or to Mrs. *Johnston* at his decease.

Soon after her father's death Miss *Totherick*, in conversation with Mrs. *Johnston*, spoke of her lonely condition, and that she had no one to take care of her. Mrs. *Johnston* replied that if she cared to do so she might come and live with her. About a fortnight later Miss *Totherick* told Mrs. *Johnston* she had made up her

V.-C. B. mind to go and live with her ; and it was arranged that the Defendants should take a bigger house at *North Shields*, in which she would live as a lodger.

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Miss *Totherick* was at this time in better health than she had previously been, and on the 21st of April she went to *Durham* with Mrs. *Johnston* and Captain *John Davis*, an old friend of her father, and, the fact that she was a minor not being disclosed, obtained probate of her father's will, dated the 27th of October, 1879, by which all his personal estate was left to her absolutely. Acting under the advice and by the direction of Captain *Davis*, Miss *Totherick*, who was described by some of the witnesses as a person of business-like habits, with a very firm will, very obstinate, and difficult to advise, wound up her father's estate and disposed of his shares in certain ships. With the proceeds of the shares and the balance of her father's deposit account, she opened an account in her own name with Messrs. *Woods & Co.*, her father's bankers. On the 1st of May she went to live with the Defendants at their house at *North Shields*, where she remained until her death on the 23rd of August, 1880. On the 28th of July the Defendant *John Johnston*, at the request of Miss *Totherick*, cashed a cheque for £500 drawn by her on her account at *Woods & Co.*, and gave her the proceeds, which she counted and locked up in a drawer in her room. On the 19th of August Mrs. *Johnston*, at the request of Miss *Totherick*, who was then confined to her bed, filled up a cheque for £290 5s. 4d., which was then signed by Miss *Totherick* in the presence of a Miss *Laidler*, and cashed by *Johnston* on the same day, and the proceeds delivered to Miss *Totherick* by Mrs. *Johnston*. On the same day Miss *Totherick* gave Mrs. *Johnston* £500 in bank-notes, saying it was given for her kindness to her, adding, in a passion, that if she thought any of her mother's blackguard, drunken relations would get any of her father's hard earned money she would burn it. Next day, in the presence of Miss *Laidler*, Miss *Totherick* asked Mrs. *Johnston* if she was going to bank this money, and said she wished it put in her (Mrs. *Johnston's*) name. On the 23rd of August Miss *Totherick* died of consumption in the bowels, aged twenty years and over three months. The £290 had not been accounted for in any way by the Defendants, who, by their statement of defence, stated that they did not

know how *Ann Totherick* disposed of the rest of the proceeds of the two cheques (beyond the £500), but that no part thereof was received by them. Before her death Miss *Totherick* also gave various articles of furniture, which had belonged to her father, to the *Johnstons*.

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The particulars mentioned were nearly the whole of *Ann Totherick's* property.

It appeared from the evidence that she had a strong feeling against her mother's relations, and spoke of Mrs. *Johnston* as the only relation who had offered her a home; and that one of her aunts, who came to see her while she was on her death-bed, became so violent that she had to be removed from the house by a policeman.

The action was brought by the Plaintiff, who had obtained administration to the personal estate of Miss *Totherick*, and also of her father, to set aside the gifts to the Defendants.

The case made by the statement of claim was that *Ann Totherick* was removed by the Defendants to their house that they might get complete control over her, and prevent her nearest relations from having any communication with her; that the Defendants, knowing she was an infant, had formed a scheme to possess themselves of the whole of her property, and in pursuance of this scheme had induced her to apply for probate of her father's will and to open an account in her own name; and had also induced her to make the gifts, for which she received no consideration, while she was completely under the control and influence of the Defendants. It was also alleged that she had no independent advice and protection, and that under the circumstances the gifts of the cheques and other personal estate ought to be declared void.

Since action brought the grant of probate of *J. W. Totherick's* will had been revoked.

The Defendants, by their pleadings, denied the several allegations contained in the statement of claim of a scheme to possess themselves of the property of *Ann Totherick* and her father; of having induced her to apply for probate of her father's will and concealment of the fact of her minority; that she was completely under their control or influence, or that they ever in any way attempted to influence her; and they alleged that she was quite

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able to attend to business, and [did in fact transact all business matters in relation to winding up her father's estate; that the shares in her father's ships were sold by the direction of and by Captain *Davis*, and that at all times while she lived in their house she was able to exercise, and did in fact exercise, her own will in all matters.

Cozens-Hardy, Q.C., and *F. H. Colt*, for the Plaintiff:—

A gift by an infant on her death-bed to a person in whose house she was living is a void transaction—absolutely void, or at any rate voidable; and where, as in this case, anything in the nature of a fiduciary or confidential relation has subsisted between the parties, the *onus* is imposed upon the donees of shewing that the transaction is one that can be supported. To entitle them to retain the gift it must be shewn to the satisfaction of the Court that the donor fully understood the nature and effect of the gift, which in this case would have left her nearly penniless if she had recovered: *Anderson v. Elsworth* (1); that it was spontaneous and made without pressure or any undue or unfair exercise of influence on the part of the donees: *Berdoe v. Dawson* (2); and especially that the donor had competent and independent advice: *Rhodes v. Bate* (3); *Kempson v. Ashbee* (4); *Story's Equity Jurisprudence* (5). Applying these tests, the gifts to the Defendants are invalid and must be set aside.

Millar, Q.C., and *W. S. Owen*, for the Defendants:—

An infant, especially one so nearly of age, is not incapacitated from disposing of her property by gift without valuable consideration: *Earl of Buckinghamshire v. Drury* (6); and no case is to be found in which a gift, made by a person of full understanding and approaching maturity, though under twenty-one, has, when completed, been set aside. No fiduciary relation between the parties is alleged in the pleadings, and the evidence shews clearly that no such relation ever existed. We submit that the Defendants have fulfilled the obligation, which is imposed by the Court

(1) 3 Giff. 154.

(2) 34 Beav. 603. *11 Am. 254*

(3) Law Rep. 1 Ch. 252.

(4) Law Rep. 10 Ch. 15.

(5) Sect. 242.

(6) 2 Eden, 60.

in every transaction in which a person obtains by voluntary donation a benefit from another, of establishing that the person giving that benefit did so voluntarily and deliberately, knowing what she was doing: *Cooke v. Lamotte* (1). Miss *Totherick* is shewn to have been perfectly competent to manage her own affairs and to attend to business, and to have acted under the independent advice of her father's friend, Captain *Davis*; and the case which is alleged by the Plaintiff of fraud and scheme on the part of the Defendants, and that Miss *Totherick* was prevented by them from having any communication with her nearest relations, has broken down completely.

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Cozens-Hardy, in reply :—

The absence of competent independent advice or protection during the whole of the transaction is enough to invalidate it. By law an infant is unable to part with her property for valuable consideration or to enter into a fiduciary contract. Can then an infant, under circumstances such as are here presented, make an irrevocable gift of the whole of her property?

BACON, V.C. :—

This case deserves very close and vigilant attention to the facts, but the principles which govern it are, I think, established in law. Two grounds are suggested by the Plaintiff upon which it is said that the gift to Mrs. *Johnston* cannot be allowed to stand. First, the infancy of the donor; and next that a fiduciary relation existed between the donor and the donee, and that therefore, upon well established rules of law, the transaction cannot be upheld.

Now, the law relating to infants may appear to be in some respects anomalous. It may be that this arises from the varying aspect in which particular cases are presented for judicial decision; it may be that in all its forms it is founded upon principles of unquestionable justice and right, but however this may be, it must be said to be settled with all its faults, if it has any, and, must be obeyed and followed in all cases to which the principle is applicable. The Common Law does not permit an infant to con-

(1) 15 Beav. 234, 240.

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tract debts or any other stipulations. So severe and positive is this law that there is a recent case (1) in which a man under twenty-one, having carried on business as a tradesman for many years and represented himself as being able to carry on that business, was held exempt from the ordinary law of debtor and creditor and could not be made a bankrupt. The statute law prohibits a minor from making a will; at the same time he may lawfully accept any benefit which has been conferred upon him; he may by himself, having become adult, or by his guardian, if he still remains an infant, enforce any contract to the benefit of which he may become entitled. An infant may contract a marriage, and the legal impediment by which the infant is prevented from executing a settlement of his or her property is removed by statute; but I am not aware of any law which prevents an infant from making a donation of any chattels or personal property in his actual possession. There is indeed a special law, the creation of Courts of Equity in this country, and the same law with somewhat wider scope prevails in other European systems of jurisprudence, by which persons who stand in what is called a fiduciary relation to infants are precluded from obtaining, or at least from retaining, donations or benefits of any kind from their actual or *quondam* wards.

The argument on behalf of the Plaintiff before me has been mainly grounded on the principle I have last referred to, but it must be borne in mind that the reason of that particular rule is that the relation of guardian and ward must be presumed to have conferred on the guardian such an amount of influence over the mind of the ward as to make it at least doubtful whether the act done by the ward was spontaneous, or whether it is to be referred to the influence which is necessarily to be inferred from the relative positions of the parties. It is, therefore, indispensable in all cases, that the guardian, upon whom the *onus* is cast, should be able to prove that the influence has ceased, or at least that it was not operative in the instance referred to. Where the guardian fails to discharge this *onus*, he is not permitted to retain the benefit appearing to be conferred upon him by his ward. If he can actually disprove or rebut the presumption that his power or authority

(1) See *In re Jones, Ex parte Jones*, 18 Ch. D. 109.

existed, or that they were the motive for the donation, there is no principle, nor any authority for saying that he is not fully entitled to the benefit which the ward clearly and unequivocally bestowed upon him.

Those are the principles which, in my opinion, must govern this case. Now the facts are these: The father of *Ann Totherick*, who was the only child of that father, was about to leave home, and cast about for some place in which his daughter should reside, and he requested, as the Defendants themselves say, Mrs. *Johnston* to take charge of his house, and of his daughter during his absence. *Ann Totherick* said she had no friend to live with excepting *Ann Johnston*. That I read from the statement of defence in answer to the amended statement of claim. Does that create the relation of guardian and ward? In my opinion it does not. The father looks about for a residence for his daughter. He is not satisfied, as the witness said, with the old lady who had taken care of his house, and he looks for a companion for her in the person of Mrs. *Johnston*. That was perfectly natural and proper. It is not because she was less than twenty-one that she would require a guardian. It is not suggested anywhere that either the state of her health or her condition in any other respect rendered any protection necessary. Companionship, no doubt, was desirable, but it would be, in my opinion, straining the facts of the case to say that any time the relation of guardian and ward subsisted between Mrs. *Johnston* and the late Miss *Totherick*. Then, when I look at the facts of the case, and especially the facts deposed to by Captain *Davis*, who was a wholly impartial person, who did give advice when advice was required, who did assist Miss *Totherick* in the realization of her father's property—I cannot doubt that she had abundance of good advice, if advice was necessary; and I cannot doubt, from what Captain *Davis* says about the character and condition of Miss *Totherick*, that she was a person perfectly able to manage her own affairs. When she consulted him as to proving her father's will, he got advice from the *Durham* Probate Court, and, as a matter of form and course, she went to the Probate Court of *Durham*, passed through the regular formalities—nobody's attention being called to the fact that she had not attained the age of twenty-one, and it is reasonable to infer

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that her appearance would suggest no doubt on the subject—and she then proved her father's will with the knowledge and sanction of Captain *Davis*, her father's friend and her adviser. She proceeded to realize, with the assistance of Captain *Davis*, her father's estate. Some of the money she received with her own hands, some she received in the shape of cheques from the purchasers of shares of her father's ships—whatever they are. The cheques came into her hands, and then, like a woman of business, she opened an account with the *South Shields Banking Company*, put the money in there, acted in all respects without a trace of any influence or without any assistance such as a guardian gives to a ward in confirmation by the guardian of what the ward has done, or is about to do or wishes to do, and so she came into possession of a sum of a little over or under £1000. She was at this time in a moribund state, as nobody can doubt. The doctor who spoke to the state of her health speaks of it as wasting, of her death as certain, but of her mind as perfectly clear, her actions wholly uncontrolled. Under these circumstances it is that she made the donation in question. Now, in my opinion, it is perfectly lawful, under such circumstances, for an infant to make a donation. If the relationship of guardian and ward—that which is adverted to in the case to which Lord Justice *Turner's* observations were directed (see *Rhodes v. Bate* (1), and a great many other cases on the subject, of which the books are full)—if that relationship subsisted, it would be easy to prove a great deal more than is here proved. [His Lordship after stating the circumstances attending the gift of the £500 to Mrs. *Johnston* as narrated in the statement of defence, and referring to some discrepancies between the statement of defence and the answer to the interrogatories, said that he did not wonder that the suspicions of the parties were aroused, and that he did not think sufficient explanation had been given.]

Besides that there is the transaction as to the £290. The poor young woman is an invalid in Mrs. *Johnston's* house; Mrs. *Johnston* knew everything that she did. £290 is traced into the hands of Miss *Totherick*, and no kind of explanation given—no suggestion that she spent it or bestowed it in any other donation. It remains there; the Defendants are the owners of the house, they

(1) Law Rep. 1 Ch. 252.

have possession of all that was contained in the house, and not a particle of evidence is given in respect of that sum. In my opinion that is a very suspicious circumstance, and although I feel myself bound to decide that the relation of guardian and ward did not subsist between these parties, and that there is no reason why the £500 should not have been given, and that, therefore, I must dismiss this action, I think, under the circumstances, I should do wrong if in dismissing it I made the Plaintiffs pay the costs of it. I therefore dismiss the action without costs.

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Solicitors: *Pattison, Wigg, Gurney, & King*, agents for *Chartres, Youll, & Wilkinson, Newcastle-upon-Tyne*; *H. C. Coote*, agent for *H. A. Adamson, North Shields*.

F. G. A. W.

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Dec. 19 20.

In re HENSLER, DECEASED.JONES *v.* HENSLER.

[1879 H. 123.]

Will—Specific Devise by Father to Child—Death of Child in Lifetime of Father—Devise by Child to Father—Lapse—Wills Act (1 Vict. c. 26), s. 33.

A father by his will devised a freehold house to a son, and his residuary real estate to trustees in trust for other persons. The son died in his father's lifetime leaving issue living at his father's death, and having by his will devised all his real estate to his father:—

Held, That as, under the 33rd section of the *Wills Act*, the son must be deemed to have survived the father, the property passed to the son absolutely under his father's will, and became subject to testamentary disposition by the son:

But that as by the will of the son the property was devised to his father, the devise by the son failed, and his heir-at-law was entitled to the property.

PETITION.

Frederick Anthony Hensler, by his will, dated the 21st of February, 1866, devised a freehold house, 20 *St. Maryleport Street*, *Bristol*, to his son *John Hensler* in fee, and also gave to his said son and his (the said testator's) two brothers, their heirs, executors, and administrators, all his real estate except such parts thereof as should vest in the said *John Hensler* under the devise thereinbefore contained, upon trusts for the benefit of his (the testator's) wife and children other than the said *John Hensler*.

John Hensler died on the 6th of August, 1875, in the lifetime of his father leaving issue, and having by his will, dated in June, 1875, devised and bequeathed all his real and personal estate to his father, *F. A. Hensler*, absolutely.

F. A. Hensler died on the 16th of August, 1878, and several children of his son *John Hensler* were living at the time of his death. An action for the administration of his estate was instituted after his death, during the proceedings in which the freehold house devised by him to *John Hensler* was sold; and the net proceeds of the sale were paid into Court and were represented by a sum of £549 8s. 8d. Consolidated £3 per Cent. Annuities.

This petition was then presented by *John Gordon Hensler*, the eldest son and heir-at-law of *John Hensler*, who was also the heir-at-law of *F. A. Hensler*, for a declaration that he was beneficially entitled to the fund in Court. The question argued arose under the 33rd section of the *Wills Act*, which is in the following terms:—

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“And be it further enacted that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.”

Millar, Q.C., and *Bissell*, for the Petitioner:—

The Petitioner is entitled as the heir-at-law of *John Hensler*. By force and virtue of the 33rd section of the *Wills Act*, *John Hensler*, as a child of the testator *F. A. Hensler*, who had died in his lifetime leaving issue living at his death, must be deemed to have survived his father, and to have taken the real estate specifically devised to him by his father with all the incidents of absolute ownership, including the power of testamentary disposition: *Johnson v. Johnson* (1); *Pickersgill v. Rodger* (2); *Eager v. Furnivall* (3). But, as by his will he devised the property back to his father—a person who is to be taken to have predeceased him—that devise had lapsed, and, there being no residuary devise, there is an intestacy, and the property goes to the Petitioner as the heir-at-law of *John Hensler*: otherwise it would again become subject to the father's will, and so go round in a circle; and the two contradictory assertions would be involved, first, that the son survived the father; secondly, that the father survived the son.

(1) 3 Hare, 157.

(2) 5 Ch. D. 163.

(3) 17 Ch. D. 115.

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Hastings, Q.C., and *Douglas Round*, for the widow and the other children of *F. A. Hensley* :—

The freehold house in question passed under the residuary devise in the will of *F. A. Hensley*. The object of the 33rd section is to prevent a devise or bequest by a father to a child from lapsing in a case where the child has died leaving issue living at the death of the father; and when that object is accomplished by vesting the absolute ownership of the devised property in the child, the force and effect of the statute is expended. The fiction by which the child's life is prolonged is not to be continued for any other purpose: *Pearce v. Graham* (1); and as the son took under the specific devise in his father's will which is thus exhausted, and he himself devised to his father, who in fact survived him, his devise to his father did not lapse, and the house passed again from the son to the father, and then, under the residuary devise in the father's will, to the trustees for the benefit of the wife and the other children of the father: *Evans v. Jones* (2); *Thompson v. Whitelock* (3).

This is quite in accordance with the principles of *Pickersgill v. Rodger* (4) and *Eager v. Farnivall* (5).

Again, the 33rd section does not take effect if "a contrary intention shall appear by the will"; and here the contrary intention is manifested, for the testator *F. A. Hensley* excepts from his residuary devise such parts of his real estate "as shall vest in *John Hensley* under the devise hereinbefore contained;" and except under sect. 33, nothing did vest in him.

Millar, in reply, referred to *Executors of Perry v. The Queen* (6).

HALL, V.C. :—

By virtue of the 33rd section of the *Wills Act*, the property passed under the devise in the father's will as if the devisee had died immediately after the death of his father. The effect of that is that I must consider the son to have survived his father and to have taken as devisee. I must also consider that the property

(1) 9 Jur. (N.S.) 568.

(4) 5 Ch. D. 163.

(2) 2 Coll. 516.

(5) 17 Ch. D. 115.

(3) 4 De G. & J. 490. *5 Jan 1881*

(6) Law Rep. 4 Ex. 27.

became subject to the son's will, and included in the general gift therein contained. The son must be deemed to have had the property; and then the question arises whether he must by a legal fiction be taken to have survived his father for all purposes, or to have survived him only for the purpose of giving effect to the gift of the father. It seems to me that the object and the purpose of the 33rd section was to effectuate the will of the father, and that that object and purpose are satisfied by holding that the son took the estate. Effect would have been given to the will of the son in case he had left his property to some one other than his father and who in fact survived him, yet as he left it to his father the gift by the son fails, for I cannot hold that the section ought to be extended to any case beyond the one expressly provided for. It must therefore be declared that *John Hensler* the son took the property but died intestate as to it, and that the Petitioner is entitled as his heir-at-law. The costs of all parties will be allowed out of the fund.

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Solicitors: *Jones, Blaxland, & Son*, agents for *J. Miller, Bristol*.

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[1880 F. 1226.]

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Jan. 12, 16.

Mortgage of Premises and Policy—Proviso for Redemption—Surety, Covenant by, to pay Interest and Premiums—Subsequent Advances by Mortgagee—Payment of Interest and Premiums by Surety—Right of Surety to a Transfer of the Securities.

In December, 1854, *S.* assigned certain premises and a policy of assurance to secure the repayment of a sum of £200 advanced to him by *W.*, and interest. The proviso for redemption was that on payment of the money *W.* would reassign the premises and policy unto *S.*, his executors, administrators, or assigns, or as he or they should direct. *F.*, by the same indenture, as surety, covenanted, for himself only, with *W.* that while the £200 or any part should remain owing he would pay the interest and premiums, and he also assigned a policy on his own life, and covenanted to pay the premiums *W.* at four different periods between May, 1856, and May, 1866, advanced moneys amounting to £530 to *S.* on the security of the same premises. *S.* made default in the payment of interest. *W.* died in 1878, and his executors

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made a demand upon *F.* for all arrears, which he paid, and he also paid the premiums on the policy of *S.* :—

Held, that *F.* was entitled to have a transfer of all the securities on paying what was due upon the mortgage of December, 1854.

Williams v. Owen (1) not followed.

Newton v. Chorlton (2) followed.

SPECIAL CASE.

By an indenture of lease dated the 1st of July, 1854, certain premises situate at *Islington* were demised by *Henry Witten* to *William Spence*, his executors, &c., for the term of ninety-five years from the 24th of June, 1852, subject to a yearly rent of £10 and the usual covenants.

By an indenture of mortgage dated the 28th of December, 1854, made between *William Spence* of the first part, the Plaintiff *J. S. Forbes*, of the second part, and *A. Weir*, of the third part, *William Spence* assigned the same premises unto *A. Weir*, his executors, &c., to secure the repayment of a sum of £200 and interest at 5 per cent : and he also assigned to *Weir* a policy of assurance on his own life for £250. The legal estate in the premises was at the date vested in the Plaintiff as the surviving trustee of a marriage settlement made in September, 1854, but which had ceased to have any effect. The proviso for redemption of the premises and policy was that on payment by *William Spence*, his heirs, executors, administrators, or assigns, of the sum of £200 to *A. Weir*, his executors, administrators or assigns, he or they would reassign the premises and policy "unto *W. Spence*, his executors, administrators, or assigns, or as he or they should direct."

By the same indenture the Plaintiff, for himself only, and not so as to bind his executors, covenanted with *A. Weir*, his executors, administrators, and assigns, that while the sum of £200, or any part thereof, should remain owing he would pay unto *A. Weir*, his executors, administrators, and assigns, interest at 5 per cent., and also pay the premiums on the policy of assurance; and as a further security for the payment of the interest and premiums the Plaintiff assigned unto *A. Weir* a policy of assurance on his own life for £100, and covenanted to pay the premiums.

(1) 13 Sim. 597.

(2) 10 Hare, 646.

The Plaintiff joined in the mortgage as surety for *William Spence, A. Weir* having declined to advance the £200 to *W. Spence* unless the Plaintiff entered into the covenants and made the assignment above-mentioned.

Subsequently to the 28th of December, 1854, *i.e.*, in May, 1856, August, 1863, August, 1864, and May, 1866, *William Spence* borrowed sums of money amounting to £530 from *A. Weir*, and by four indentures charged the same premises with the payment thereof and interest. The Plaintiff had no knowledge of these advances having been made until the 6th of November, 1875. *William Spence* paid interest on the £200 until the 28th of June, 1867, and he also paid the premiums on his policy.

A. Weir died in September, 1878, having, by his will, made in 1874, appointed three executors, the Defendants *Jackson* and *Robins* being two of them, and they, in September, 1878, made a demand upon the Plaintiff for arrears of interest on the £200 from the 28th of June, 1867. The Plaintiff paid the arrears, and also the interest which accrued due up to the 28th of December, 1879, under the mortgage of December, 1854, and he had also paid the premiums on the policy of assurance on the life of *William Spence* from the year 1868 up to the present time, and he had paid certain costs in connection with the mortgage.

On the 22nd of December, 1879, the Plaintiff gave to the Defendants *Jackson* and *Robins* notice of his intention to pay off the £200, and on the 28th of June, 1880, he, in pursuance thereof, tendered that sum, together with the half-year's interest, and offered to pay any costs properly payable in respect of the mortgage, and requested them to transfer to him all the securities comprised in the mortgage, including the leasehold premises, but they declined to accept the £200, and required the Plaintiff not only to pay that sum, but also to pay the four other sums advanced to *W. Spence*, and the arrears of interest due thereon. They, however, offered to accept the £200, and to assign to the Plaintiff the two policies of assurance, but they claimed to retain the leasehold premises as security for the further sums advanced.

The questions were, whether on payment by the Plaintiff of the

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£200, and the interest, premiums, and costs (if any) due in respect of the mortgage of the 28th of December, 1854, he was entitled to have all or any of the securities comprised therein transferred to him, and to hold the same as security for the repayment of the sums paid by him under the mortgage; and by whom the costs of the action were to be borne.

*Kekewich*, Q.C., and *Hornell*, for the Plaintiff, having stated the facts of the case, were stopped by the Court.

*W. Pearson*, Q.C., and *L. Field*, for the Defendants, the executors:—

The proviso for redemption states that the mortgagee would at the request of *W. Spence* or his executors reassign the premises and policy to him or them, or as he or they should direct. It was not a proviso in favour of the Plaintiff, who was not a surety for payment of the £200, as he only covenanted that so long as any part of it remained owing he would pay the interest and the premiums on the policy, and the further advances were made by the mortgagee on the security of the premises some years before the Plaintiff paid the arrears of interest. The decision in *Williams v Owen* (1) is clearly in favour of the executors' contention that the Plaintiff will not be allowed to redeem the mortgage without paying them the four other sums which the mortgagor charged upon the premises. That case has not been overruled. It was considered to be law in 1 *Tudor's Leading Cases* (2), and was followed in the case of *Farebrother v. Wodehouse* (3).

[*Kekewich*, Q.C., referred to the decision in *Hopkinson v. Rolt* (4).]

That decision has no application here, as it was merely that further advances made with notice by the first mortgagee to the mortgagor cannot take priority over a second mortgage which was effected prior to the further advances. In this case the mortgagee when he advanced his money on the further charges

(1) 13 Sim. 597.

(2) 5th Ed. p. 116.

(3) 23 Peav. 18-27.

(4) 9 H. L. C. 514.

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became an assign of the equity of redemption, and he is entitled to priority over the Plaintiff, who does not come within the proviso for redemption. Nor is the decision in *Bowker v. Bull* (1) an authority against the executors. The right to redeem and the right to call for a transfer of the securities were confounded there, and they are quite distinct rights, as pointed out in *Williams v. Owen* (2).

[HALL, V.C. :—Have you considered the decision in *Newton v. Chorlton*? (3)]

That case was one in reference to releasing the surety, but here the question is as to the right of the Plaintiff to redeem. *Williams v. Owen* was commented upon in that case, but it was not overruled and it is, as submitted, still good law.

[The case of *Dawson v. Bank of Whitehaven* (4) was also referred to.]

*Theobald*, appeared for the Defendant, *W. Spence*.

HALL, V.C. :—

The arguments which have been submitted on behalf of the executors do not affect the conclusion which I, in the course of them, intimated that I had come to; nor do they affect the principle laid down in the case of *Newton v. Chorlton* to which I referred on Thursday last. I consider that the decision in that case is perfectly good law, subject to this observation, that Vice-Chancellor Sir *W. Page Wood* expressed an opinion that where an additional security is taken by the creditor after the original security was given and the contract of suretyship entered into the right of the surety as regards the securities given to the principal creditor did not extend to the additional securities. The Vice-Chancellor did not think that the cases went so far as to give a surety the benefit of the security subsequently taken by the creditor. But that is a view which never commended itself to me, and it was certainly not adopted by Lord Justice *Knight Bruce* and

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(1) 1 Sim. (N.S.) 29.

(2) 13 Sim. 597.

(3) 10 Hare, 646.

(4) 4 Ch. D. 639; 6 Ch. D. 218.

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Lord Justice *Turner* in a case before them of *Lake v. Brutton* (1), and I may observe that Vice-Chancellor Sir *W. Page Wood* himself, in a case afterwards before him of *Pledge v. Buss* (2), stated that his judgment in that case had been disapproved of by those Lord Justices, although not absolutely overruled. The Vice-Chancellor added: "I am as much bound to submit to their opinion as if the decision had been reversed on appeal before them." The Vice-Chancellor did not mention the names of the cases to which he referred, but I may state that some twenty years ago in my copy of Mr. *Johnson's* reports I noted against *Pledge v. Buss* the case of *Lake v. Brutton* as being the one which the Vice-Chancellor had in his mind, and there is also another case of *Pearl v. Deacon* (3) which I thought was referred to by him. That was an appeal from a decision of the late Master of the Rolls (Sir *John Romilly*) (4). It was the case of a subsequent security; but it is not material for my purpose to consider the general question whether there has been a release, or what is the effect of taking an additional security, and then whether that additional security should be held available for the benefit of the surety. There has never been, so far as I know, any disapproval of the general principle which was laid down by the Vice-Chancellor in *Newton v. Chorlton* (5), except so far, if at all, as the Master of the Rolls may have dealt with it in *Farebrother v. Wodehouse* (6), where he seems to have followed the case relied upon here of *Williams v. Owen* (7), which certainly, if it were law, would be an authority in favour of the executors. In the case of *Newton v. Chorlton* the principle laid down by Vice-Chancellor Sir *W. Page Wood* was that a surety was to have the benefit of all securities, "whether by way of suretyship or mortgage," and he afterwards added (8): "The surety has a right at any moment to every security held by the creditor at the date of the contract—it has never yet gone beyond that; and he has further a right to say, you must always hold yourself in a position to be put in motion, at my request, against the principal debtor." I consider that the decision

(1) 8 D. M. & G. 441.

(2) Joh. 663, 668.

(3) 1 De G. & J. 461.

(4) 24 Beav. 186.

(5) 10 Hare, 646.

(6) 23 Beav. 18.

(7) 13 Sim. 597.

(8) 10 Hare, 652.

in *Newton v. Chorlton* (1) was carried higher by the decision of the Lords Justices in *Lake v. Brutton* (2), which, as I have said, the Vice-Chancellor himself recognised in *Pledge v. Buss* (3), and I consider the decision must be applicable to securities taken subsequently to the original mortgage. The Master of the Rolls in *Farebrother v. Wodehouse* (4) appears to have followed *Williams v. Owen* (5), as it applies to a subsequent security taken by the original creditor—that he could make advances to the debtor, and that they would prevail over the right of the surety. That principle is entirely at variance with the decision in *Newton v. Chorlton*, and it is a singular circumstance that in a subsequent case of *Drew v. Lockett* (6) before him, although he had followed *Williams v. Owen*, Lord Romilly said (7), “I am of opinion that a surety who pays off the debt for which he became surety must be entitled to all the equities which the creditor whose debts he paid off, could have enforced, not merely against the principal debtor, but also as against all persons claiming under him.” It was odd that Lord Romilly should agree with the principle laid down in *Newton v. Chorlton*, and yet come to a conclusion in *Farebrother v. Wodehouse* which seems to be at variance with it. The principle on which Vice-Chancellor Sir W. Page Wood proceeded was the same as laid down by Lord Eldon in the case of *Mayhew v. Crickett* (8), which I consider a leading authority, and also laid down in earlier cases:—that the surety is entitled to have all the securities preserved for him, which were taken at the time of the suretyship, or, as I think it is now settled, subsequently. Nor does it matter at all in principle, whether the creditor takes a further security for further advances made prior to the time when the surety makes payment of the debt. They have nothing to do with the surety. He is entitled to the benefit of the securities, though his payment be not made until after the time when the further advances were made by the creditor. The principle is that the surety in effect bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment, and it is the

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(1) 10 Hare, 646.

(2) 8 D. M. &amp; G. 441.

(3) Joh. 663, 668.

(4) 23 Beav. 18.

(5) 13 Sim. 597.

(6) 32 Beav. 499.

(7) Ibid. 505.

(8) 2 Sw. 185.

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duty of the creditor to keep the securities intact; not to give them up or to burthen them with further advances. The same principle was enunciated in the case of *Duncan, Fox, & Co. v. North and South Wales Bank* (1), where the Master of the Rolls on the hearing upon appeal from the judgment of Vice-Chancellor *Little*, said (2): "It cannot be said that in every instance a surety is entitled to stand in the place of the principal creditor as regards other securities. That is true as regards securities given by the debtor, but is not true as regards securities given by co-sureties." But here I have nothing to do with the question which was decided in that case—a question between persons alleged to be co-sureties. That case was carried to the House of Lords, and is reported in 6 App. Cas. 1. The House of Lords, though they reversed the judgment of the Court of Appeal, did not say anything which affected the principle referred to by the Master of the Rolls, and which is all that I desire to notice. I consider that the principle laid down in that case is perfectly plain and right; and also that the decision in *Williams v. Owen* (3) is not law now, and cannot after the cases to which I have referred be followed. I decline to recognise it. There is another case to which I desire to refer, that of *Green v. Wynn* (4) in which there was a surety, and Lord *Hatherley* said (5), "but where there is a mortgage of course any person under a liability to pay the interest would be at liberty to redeem." I am of opinion, therefore, that the Plaintiff was right in his offer to pay off the debt, and that he is entitled to have the securities, and to say that the further charges for the sums subsequently advanced are inoperative as against him. The Defendants, the executors, having refused the offer made, and being wrong in insisting on retaining the securities for the subsequent advances, must pay the costs of the action.

The declaration will be that on payment to the executors of what shall be found due for principal, interest, and costs in respect of the mortgage of the 28th of December, 1854, the Plaintiff is entitled to have the securities comprised in the deed trans-

(1) 11 Ch. D. 88.

(3) 13 Sim. 597.

(2) *Ibid.* 95.

(4) Law Rep. 4 Ch. 204.

(5) Law Rep. 4 Ch. 207.



ferred to him, and to hold them as securities for the repayment to him of the sums which may be paid to the executors by him. The costs of the Plaintiff will be deducted from the sum which he may be required to pay, as in *Wheaton v. Graham* (1); but the interest will not be stopped as from the date when the offer of payment was made.

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Solicitors: *Robins & Peters; John White.*

(1) 24 Beav. 483.

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Feb. 10, 11.

[1882 C. 283.]

*Settlement—Power of Sale—Duration—Determination—Intention of Settlor—Remoteness.*

226 D 286 A power given to the trustees of a settlement or will to sell land comprised in it can be exercised by them after the property has, under the trusts, become absolutely vested in persons who are *sui juris*, if on the construction of the instrument it appears to be the intention of the settlor or testator that it should be then exercised, provided that the power in its creation was not obnoxious to the rule against perpetuities, and that the *cestuis que trustent* have not put an end to the trusts by electing to take the property as it stands.

### ADJOURNED SUMMONS.

On the 3rd of May, 1881, the trustees of the will of *William Cotton* entered into an agreement with the School Board for *London* to sell to the Board a piece of land, with some houses thereon, situate in *Acland Street*, in the parish of *Limehouse*, *Middlesex*.

By the abstract of title delivered by the vendors, it appeared that they purported to sell the property under a power of sale contained in the will of *William Cotton*.

The testator, by his will dated the 6th of July, 1865, gave and devised his *Bow Common* estate, which included the property sold to the Board, unto and to the use of the trustees therein named, their heirs, executors, administrators, and assigns respectively, upon and for the several trusts and purposes following, viz., upon trust that the trustees should raise by way of mortgage upon the estate, or some part thereof, the sum of £30,000, and should stand possessed of the same and the interest thereof upon the trusts thereafter declared, and (subject as aforesaid) that the trustees should, for so long as they should think fit, during a period commencing at his decease and ending at the expiration of a term of twenty-one years, to be computed from the decease of the last survivor of the several persons named in his will, manage the estate, in whatever manner they should deem expedient, they

exercising, as regarded such management, all and every or any of the powers and discretions thereafter given to them, in conformity, nevertheless, with the express restrictions and qualifications thereafter contained. And the testator declared that, subject thereto, his trustees should stand seised and possessed of the estate in trust for his wife during her life, with remainder upon trust for the benefit of his eight children in equal shares. The testator then, after stating that his *Bow Common* estate consisted in part of building sites and land adapted for building, and in other part of incomplete buildings and works, and that it was his wish that such sites and land should be built upon, laid out for building, or otherwise improved, and that such incomplete buildings and works should be completed as expeditiously as circumstances would reasonably admit of, proceeded to give to his trustees various specific powers of management, the nature of which is stated in the judgment of the Court. And he further provided that it should be lawful for his trustees, at any time or times during the said period commencing on the day of his decease and ending on the day of the expiration of a term of twenty-one years from the decease of the last survivor of the several persons named in his will, absolutely to sell his *Bow Common* estate, or any part or parts thereof, either wholly or partially freed from all or any of the mortgages affecting the same.

The testator died on the 1st of December, 1866, and his widow had died before the agreement to sell to the Board. The Board objected that, if all the persons beneficially entitled under the will were *sui juris*, the power of sale was gone. The vendors replied that the persons entitled were all *sui juris*, but they insisted that the power of sale was still subsisting. The Board required that the persons beneficially entitled under the will should join in the conveyance. The vendors declined to comply with this requisition, and took out a summons under the *Vendor and Purchaser Act*, 1874, asking the opinion of the Court whether they had, under the will of the testator, power to sell and to make a valid assurance of the property comprised in the agreement with the Board, without the concurrence of any other person or persons, so as to vest the property in the Board as the purchasers thereof in fee simple.

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*W. W. Karlake, Q.C., and C. J. Ruscombe Poole, for the sum-*  
mons :—

The power of sale is still in existence, and we can make a good title under it.

*A. R. Kirby, for the Board :—*

The power of sale is one of a set of powers of management, and is only ancillary to the settlement. The settlement has come to an end by the vesting of the property, under the ultimate limitations, absolutely in persons who are *sui juris*, and the power is therefore at an end: *Sugden on Powers* (1); *Lantsbery v. Collier* (2); *Wolley v. Jenkins* (3); *Taite v. Swinstead* (4). The cases of *In re Brown's Settlement* (5) and *Peters v. Lewes and East Grinstead Railway Company* (6) were exceptions from the general rule, but the rule is fully recognised.

At any rate, the power may be at any moment determined by the beneficiaries, and such a title ought not to be forced on a purchaser.

FRY, J. :—

The question is whether the trustees of the will of the late *William Cotton* have power to sell certain property to the School Board for *London*, without the concurrence of any other person or persons.

It appears that the beneficial interest in the property in question is vested in undivided eighths in certain persons, and it has been argued on the part of the purchasers that, whenever the interests under a will or settlement have absolutely vested in a person or persons who are *sui juris*, any existing powers with regard to that property have come to an end.

Before proceeding to consider that argument, I must observe that there is the greatest possible distinction between the determination of a power under the instrument which created it, and its extinction by the concurrence of the persons who are entitled to take the property which is the subject of the power. The

(1) 8th Ed. pp. 850 *et seq.*

(2) 2 K. & J. 709.

(3) 23 Beav. 53.

(4) 26 Beav. 525.

(5) Law Rep. 10 Hq. 349.

(6) 18 Ch. D. 429.

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former appears to me, subject to the question of the power going beyond the period allowed by law for the duration of such powers, to be a mere question of the intention of the donor of the power, as evidenced by the instrument by which the power was created. It seems needless to dwell upon that, because, if the power be valid, the sole question is whether it has been created, and that again is really a question of intention and of construction. Lord *St. Leonards* in his book upon "Powers" has pointed out that that is the true criterion as to the existence of powers. Referring to the cases arising out of settlements, he says (1), "It frequently happens that a tenant for life of an estate in strict settlement, with the ultimate remainder to himself in fee, with powers of leasing, jointuring, charging portions, sale and exchange, &c., acquires the fee by the failure of the limitations intermediate between his life estate and remainder; and it may be questioned whether all these powers continue after the accession of the fee. Perhaps the better opinion is, that the powers cannot be exercised after the union of the estates, on the ground, not that the powers are merged, but that, according to the true construction of the settlement, they were not to be exercised after the determination of the limitations which they were intended to overreach. To this there could be no objection; it would not affect any prior exercise of the power, although by will." Then he refers to one of the earliest cases upon this question, *Mortlock v. Buller* (2), in which a settlement had been made, and during the life of the tenant for life the life estate had united with the ultimate remainder, and he then observes: "The substantial ground upon which such a power in trustees should be held not to be subsisting is, that the intention of the settlement was to confine it to the time during which the uses of the settlement existed." Accordingly, it is well ascertained that, where there is a settlement of real estate, either by will or by deed, and the settlement ultimately carries the land to a person entitled in fee simple, and there are powers couched in general words and without limitation as to time, which are, nevertheless, obviously intended to be exercised only during the subsistence of the intermediate limitations, there, the moment the estate in fee is vested, the powers are at an end, because it was the intention of

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(1) 8th Ed. p. 859.

(2) 10 Ves. 292.

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the settlement that they should subsist only during the intermediate limitations, and therefore in that case the vesting of the estate absolutely in the persons ultimately entitled is an indication that, according to the true construction of the settlement, the intention of the settlor, with regard to the powers, has come to an end. That is an illustration of the principle that you must look at the intention of the settlor or testator. Another case recently decided may be referred to to shew the way in which the Court looks at the intention. In *Peters v. Lewes and East Grinstead Railway Company* (1) a power was created for the purpose of dividing the property amongst the persons who were ultimately to take it absolutely. If the Court had there held that the absolute vesting of the ultimate interests had put an end to the power, they would have defeated the object and intention of the creator of the power, and, accordingly, the Court held that the power subsisted, notwithstanding that the ultimate estates had vested absolutely.

So here, the question is, what was the intention of the settlor or deviser? To my mind that is reasonably apparent. The testator was possessed of a large building estate, called "the *Bow Common* estate," which he gave to certain trustees, who are the present applicants, upon trust to raise the sum of £30,000 by mortgage, and then he indicated a period which was to run from his death to the expiration of twenty-one years from the death of the survivor of all the persons named in his will. The object of so limiting that period was to keep the estate together for the purpose of management, as long as the law would permit. He then gave the benefit of the estate to his wife for her life, with remainder in undivided eighths, which are stated to have become vested in persons who are now *sui juris*. During the term to which I have already referred he directed the trustees to manage the estate. The object of the testator is made plain by the recital which is contained in the will. [His Lordship read the recital, which is stated above.] He, therefore, clothes his trustees during the period to which I have referred with very ample and very specific powers of management. They may enter into contracts for building, they may build, they may lay out roads, they may make advances to builders, they may lease, and lastly, they may

(1) 18 Ch. D. 429.

sell; and it is under that power of sale that the present contract has been made. Moreover, the testator by his will created a special fund, which he called his "*Bow Common* estate capital," which was to be used by the trustees during this period as the capital for carrying on building operations upon this estate, and it was ultimately to vest in a manner corresponding with the limitations of the estate.

Nothing can be more plain, to my mind, than the intention of the testator that, during the period to which I have referred, the estate and the fund should be managed together by the trustees as a common concern, in order to utilise and improve the estate. That was his intention, and it would be a violation of his intention if I were to hold that it had come to an end by the absolute vesting of the beneficial shares. Nothing could be more inconvenient than for persons entitled to undivided eighths to have the management and carrying on of a concern of this kind. The case is very similar to that which would have occurred if the testator, being the owner of a business and land connected with it, had vested the business in trustees for the purpose of their carrying it on during the same period. It would be very difficult in such a case to say that the intention of the testator was that the power should come to an end when the beneficial interests in the business had become absolutely vested.

The question, therefore, in my judgment, being merely one of intention, I conclude that the intention of this testator was that this enterprise should be carried on during that period which he has indicated. It has not been suggested that that period transgresses the law against perpetuities, and, therefore, it is valid. I am not deciding that the persons beneficially interested might not at any moment put an end to the power and the trusts connected with the term; but there is no suggestion that they have yet done so. The power must, therefore, be assumed to be still subsisting, and the trustees can make a good title under it, without the concurrence of any one else.

Solicitors for trustees: *Prideaux & Sons.*

Solicitors for School Board: *Gedge, Kirby, Millett, & Morse.*

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Feb. 17, 18.

## HARTER v. COLMAN.

[1881 H. 1566]

*Mortgage—Consolidation—Union of Mortgages on different Estates after  
Assignment of Equity of Redemption of one of them.*

When two mortgages, made by the same mortgagor to different mortgagees on different estates, become united for the first time in one person after the mortgagor has assigned (by way either of sale or mortgage) the equity of redemption of one of them, the owner of the two mortgages cannot consolidate them as against the assignee of the equity of redemption, even though both the mortgages were created before the assignment.

The assignee of an equity of redemption takes it subject to all equities which affect the assignor in respect of it at the date of the assignment, but the possibility that the mortgage may, by virtue of its subsequent union in the same person with a mortgage of another estate made, previously to the assignment, by the same mortgagor to a different mortgagee, become liable to consolidation, is not such an equity.

*White v. Hillacre* (1) approved and followed.

*Beevor v. Luck* (2) disapproved and not followed, on the ground that its authority has been much impaired by the observations made upon it by Lord Chancellor Selborne and Lord Blackburn in *Jennings v. Jordan* (3).

*Vint v. Padget* (4) distinguished.

THIS was an action for the foreclosure of several mortgages.

By a deed dated the 6th of December, 1854, *G. H. Whalley* conveyed some lands situate in the parishes of *Llangollen* and *Ruabon*, in the county of *Denbigh*, to *Richard Simpson* the elder and *Henry Bury*, in fee, by way of mortgage to secure the sum of £11,000 and interest.

By a deed dated the 9th of November, 1861, *G. H. Whalley* charged the hereditaments comprised in the deed of the 6th of December, 1854, with the payment to *Richard Simpson* the elder and *Henry Bury* of the further sum of £5000 and interest.

*Richard Simpson* the elder died on the 8th of March, 1872.

By a deed dated the 16th of July, 1873, and made between *Henry Bury* of the first part, *G. H. Whalley* of the second part, and *J. C. Harter* and *Richard Simpson* the younger of the third parts, the hereditaments comprised in the mortgage of the 6th of

(1) 3 Y. & C. Ex. 597.

(2) Law Rep. 4 Eq. 537.

(3) 6 App. Cas. 698.

(4) 2 De G. & J. 611.

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December, 1854, were, with other hereditaments, assured to *J. C. Harter* and *Richard Simpson* the younger, in fee, by way of mortgage to secure £17,500 and interest.

On the 12th of May, 1877, the mortgage debt of £17,500 and the securities for it were transferred by *J. C. Harter* and *Richard Simpson* the younger to *Richard Simpson* the younger and *W. T. Langford*, and on the 6th of November, 1879, the mortgage debt of £17,500 and the securities for it were transferred to the Plaintiff, *J. F. H. Harter*.

By a deed dated the 2nd of July, 1874, *G. H. Whalley* conveyed some lands situate at *Hafod* and elsewhere to *J. C. Harter* and *Richard Simpson* the younger, in fee, by way of mortgage to secure the sum of £10,000 and interest.

By another deed dated the 2nd of July, 1874, *G. H. Whalley* charged the hereditaments comprised in the mortgage deed of the 16th of July, 1873, with the payment to *J. C. Harter* and *Richard Simpson* the younger of the mortgage debt of £10,000 and interest, as well as the mortgage debt of £17,500 and interest.

On the 12th of May, 1877, the mortgage debt of £10,000 and the securities for it were transferred to *Richard Simpson* the younger and *W. T. Langford*, by whom they were on the 6th of November, 1879, transferred to the Plaintiff.

By a deed dated the 31st of October, 1873, *G. H. Whalley* demised some lands at *Plas Madoc*, and elsewhere to *John Brown*, his executors, administrators, and assigns, for a term of 1000 years, by way of mortgage to secure £723 and interest. On the 4th of March, 1876, this mortgage debt and the security for it were assigned by *John Brown* to *Mary Thomas*, by whom they were on the 27th of November, 1879, assigned to the Plaintiff.

By a deed dated the 27th of March, 1877, part of the hereditaments comprised in the mortgage of the 31st of October, 1873, was, with other property, conveyed by *G. H. Whalley* to *Jeremiah Colman* and *John Boustead*, in fee, by way of mortgage, to secure £65,000 and interest.

*G. H. Whalley* died on the 8th of October, 1878.

The Defendants to the action were *Colman* and *Boustead*, and the real and personal representatives of *G. H. Whalley*.

By his statement of claim the Plaintiff claimed to have an

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account taken of what was due to him in respect of his mortgages; a declaration that he was entitled to consolidate all his securities; and foreclosure of the Defendants in default of payment by them, or some or one of them, of what should be found to be due to the Plaintiff.

*Cookson*, Q.C., and *O. L. Clare*, for the Plaintiff:—

*Beevor v. Luck* (1) is an express decision that in such a case as the present the right to consolidation exists as against, not only the mortgagor, but also the Defendants *Colman* and *Boustead*. It is true that *White v. Hillacre* (2) is a decision to the contrary, but the judgment of Baron *Alderson* there does not deal very fully with the doctrine of consolidation, and the decision was commented on and disapproved by Lord *Hatherley* in the later case of *Beevor v. Luck*. And in the recent cases of *Mills v. Jennings* (3) and *Cummins v. Fletcher* (4) *Beevor v. Luck* is recognised as a binding authority. It is true that observations unfavourable to it were made by Lords *Selborne* and *Blackburn* in *Jennings v. Jordan* (5), but they did not profess to overrule it.

[They also referred to *Ireson v. Denn* (6), *Tassell v. Smith* (7), *Vint v. Padget* (8), and *Baker v. Gray* (9).]

*J. Pearson*, Q.C., and *A. Bailey*, for the Defendants *Colman* and *Boustead*:—

In *Hopkinson v. Rolt* (10) it was held that a first mortgagee cannot have priority over a second mortgagee in respect of further advances made by him after he had notice of the second mortgage, even though the first mortgage was given to secure an existing debt and further advances. The same principle applies to the present case. It would be inequitable to allow consolidation as against us.

[FRY, J., referred to *Watson v. Mid-Wales Railway Company* (11).]

(1) Law Rep. 4 Eq. 537.

(2) 3 Y. & C. Ex. 597.

(3) 13 Ch. D. 639, 647.

(4) 14 Ch. D. 699.

(5) 6 App. Cas. 698.

(6) 2 Cox, 425.

(7) 2 De G. & J. 713.

(8) Ibid. 611.

(9) 1 Ch. D. 491.

(10) 9 H. L. C. 514.

(11) Law Rep. 2 C. P. 593.

*John W. S. 112*  
*7 June 1882*

*Beever v. Luck* (1) cannot, after the observations made on it in *Jennings v. Jordan* (2), be treated as a binding authority, and *White v. Hillacre* (3) ought to be followed in preference.

*W. S. Owen*, for the representatives of the mortgagor.

*Clare*, in reply.

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FRY, J.:—

The question which I have now to determine relates to the consolidation of mortgages. It has been argued very ably by Mr. *Clare*, and it may be thus stated. A mortgagor mortgages *Whiteacre* to *A.*, and he mortgages *Blackacre* to *B.* He then conveys the equity of redemption in *Whiteacre* to *C.*, and subsequently *A.* and *B.* both assign their first mortgages to *D.*, or, which would come to the same thing, *B.* transfers his mortgage to *A.* Can *D.* in the one case, or can *A.* in the other, consolidate the mortgages as against *C.*, the assignee of the equity of redemption of one of the two mortgaged properties?

I will consider the question first upon principle, and in the next place with reference to the authorities. The principle upon which the Court has proceeded with regard to the consolidation of mortgages I take to be this, that the mortgagor or his assignee who asks for the assistance or the mercy of the Court, on the ground of his equity, must himself do equity, and the question is what equity must he do? Taking the case of an assignment of an equity of redemption, must the assignee of the equity of redemption do all such equities as his assignor would have been liable to at the time when the redemption action was brought, or must he perform, and hold subject to, those equities only to which his assignor was liable at the date of the assignment? If it be the former, the assignee of the equity of redemption of one of the estates would be in no better position than the assignor, if he had remained the owner of both of the equities of redemption. If, on the other hand, the assignee takes subject to those equities only which were subsisting against his assignor at the time of the

(1) Law Rep. 4 Eq. 537.

(2) 6 App. Cas. 698.

(3) 3 Y. & C. Ex. 597.

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assignment of the equity of redemption, he will be in a better position than the assignor, because the union of the two mortgages in the case supposed takes place subsequently to the assignment, and the equity which arises from the union, therefore, originates subsequently to the assignment.

It appears to me that the Courts have laid down the principle, that the equities to be performed by the assignee of an equity of redemption are those to which his assignor was liable at the date of the assignment. In *Beevor v. Luck* (1), which has been referred to so much during the course of this discussion, Lord *Hatherley* said (2): "The real point seems to be this, as far as it is possible to apply reasoning to a rule which is somewhat difficult to reconcile altogether with sound principles; whenever the right to redemption is passed over to another person by the original mortgagor, whether he sells the whole property or passes it by way of mortgage only,—in either one case or the other, he passes it over subject to the same equities as against the purchaser or mortgagee to which he himself was subject."

In like manner in *Cummins v. Fletcher*, in the Court of Appeal, Lord Justice *Cotton*, speaking of the doctrine of consolidation, said (3), "That was extended to persons taking from him (the mortgagor), on the simple ground that the purchaser of an equity took with all the equities affecting his vendor existing at the time the purchase took place."

Again in the House of Lords, in *Jennings v. Jordan*, the Lord Chancellor *Selborne* (4) thus expressed himself: "The purchaser of an equity of redemption must take it as it stood at the time of his purchase, subject to all other equities which then affected it in the hands of his vendor, of which the right of the mortgagee to consolidate his charge on that particular property with other charges then held by him on other property at the same time redeemable under the same mortgagor was one."

I may refer by way of analogy to the case which I mentioned in the course of the discussion, *Watson v. Mid-Wales Railway Company* (5), as illustrating what I understand to be the rule applicable to the assignment of *choses in action*—viz., that the

(1) Law Rep. 4 Eq. 537.

(3) 14 Ch. D. 712.

(2) Ibid. 546.

(4) 6 App. Cas. 701.

(5) Law Rep. 2 C. P. 593.



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assign of a *chose in action* takes it subject to all equities subsisting at the time of the assignment, and not to equities which arise subsequently, and which did not exist at that time.

Now, if that be the true principle, it remains to be considered whether, in the case which I have supposed, there was any equity to consolidate subsisting against the mortgagor at the time of the assignment of the equity of redemption of *Whiteacre* to *C.*; and, in my judgment, the answer must be that there was no such equity subsisting, and for this very simple reason, that the equity arises out of the union in the same person of the two first mortgages, and that union did not exist at the time of the assignment of the equity of redemption to *C.* Consequently, *C.* taking subject to the equities subsisting at the time of the assignment and to no other, and this not being an equity subsisting at that time, he did not take subject to it. So far on principle.

Now, with regard to the authorities which have been cited. In the first place, I lay aside *Vint v. Padget* (1), for this very simple reason, that in that case the two equities of redemption were in one and the same person, and not, as in the present case, vested in different persons, and the Court may well say that, where both the first mortgages are vested in one person, and both the equities of redemption are vested in another, the owner of those equities of redemption must do equity, and must give effect to the equities relating to both the estates. That I take to be the principle of *Vint v. Padget*. The precise point now raised did, however, occur in *White v. Hillacre* (2). Though the facts are a little complicated, they raise, in my judgment, precisely the same question which is raised in the present case. There it appears that *James Hillacre* had mortgaged a property, called *Madgeon*, to a person named *Clark*, and then had devised that property to *Thomas Hillacre*. *Thomas Hillacre* had mortgaged another property called *Westhay* to *Clitsome*. He was then the owner of the equity of redemption of both those properties. He devised the equity of redemption in *Madgeon* to *A.*, and the equity of redemption in *Westhay* to *B.*, then *Clark* assigned his mortgage to *Clitsome*. Therefore, subsequently to the devise of the equity of redemption by *Thomas Hillacre* and not before, the two first mortgages became vested in

(1) 2 De G. &amp; J. 611.

(2) 3 Y. &amp; C. Ex. 597.

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the same person, and it was held that the right to consolidation did not exist. Baron *Alderson*, who determined that case, did not very fully discuss the principle of consolidation, and his observations may be open to the criticism which has been passed upon them by Lord *Hatherley* in *Beevor v. Luck* (1), but the decision has stood for years, and is entitled to great weight.

The next case in which the precise point arose is *Beevor v. Luck*. There Lord *Hatherley* (then Vice-Chancellor *Page Wood*), having, in substance, the same point before him, came to the opposite conclusion, and criticised the decision of Baron *Alderson* in *White v. Hillaire* (2). Now it is very important to consider the reasoning of Lord *Hatherley*, and though I have already read a passage from his judgment, I will read the same passage again in order to shew the principle upon which he proceeded. He said (3), "Whenever the right to redemption is passed over to another person by the original mortgagor, whether he sells the whole property or passes it by way of mortgage only,—in either one case or the other, he passes it over subject to the same equities as against the purchaser or mortgagee to which he himself was subject. That being so, the purchaser is obliged to take it, as was said in *Vint v. Padget* (4), knowing that it is liable to the contingency of the coalescing of the two mortgaged estates, even although at the time of the conveyance they may not have coalesced." Speaking with that deference which we all feel for any judgment of that very learned Judge, I am unable to follow that reasoning. In substance it is this. The assignee of an equity of redemption takes it subject to all equities affecting the mortgagor and existing at the time of the assignment; the contingency of the right to consolidate arising out of the subsequent coalescing of the mortgage with another mortgage made by the mortgagor on a different estate is such an equity; therefore, the assignee takes subject to that equity. I answer with the utmost deference that the contingency of a right to consolidate arising out of the subsequent union of the two mortgages is not an equity; it is the possibility or the contingency of an equity, but it is not an equity. The equity does not exist until that contin-

(1) Law Rep. 4 Eq. 537.

(2) 3 Y. & C. Ex. 597.

(3) Law Rep. 4 Eq. 546.

(4) 2 De G. & J. 611. *L. J. 1882*

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gency has happened, and therefore I venture to think that the reasoning of the Vice-Chancellor is open to very obvious criticism, and that the suppressed proposition in his syllogism is one which only requires to be stated that it may be seen to be erroneous.

The case, however, does not rest there, for in *Mills v. Jennings* (1), in the Court of Appeal, the Court, by the mouth of Lord Justice Cotton, seems to have recognised *Beevor v. Luck* (2) as good law, and they drew a distinction between the case then before them and *Beevor v. Luck*. I should feel myself very much embarrassed by those observations were it not that the same case afterwards went to the House of Lords, and that there the learned Lords who delivered judgment did not adopt the view of the Court of Appeal that *Beevor v. Luck* was binding law, but expressed, to say the very least, grave doubts whether *White v. Hillacre* (3) was not the better decision of the two.

It is enough for me to refer to these passages in Lord Selborne's judgment (4): "I have much more difficulty," his Lordship said, "in following, or satisfactorily explaining, the principle of some other authorities (such as *Beevor v. Luck*), which have held (contrary to the decision of Baron Alderson, in *White v. Hillacre*), that a mortgagee's right to consolidate as against the purchaser of the equity of redemption of property mortgaged to him is capable of being enlarged, after the date of that purchase, by a transfer to the mortgagee of other mortgages, which were then in other hands, and with the equity of redemption of which (if there were no consolidation) the purchaser would have nothing to do. I do not, however, think it necessary or proper now to determine whether this enlargement of the doctrine has been (as some eminent Judges have thought) conclusively settled by authority. The explanation of it which has been offered is, that at the date of the purchase of the equity of redemption the doctrine of consolidation was potentially applicable to any two or more mortgages, then in existence and redeemable by the same person (although then in separate hands), if they should afterwards come together. I cannot say that this commends itself to my mind as reasonable or equitable; but the contention of the Appellant, in the present

(1) 13 Ch. D. 639, 647.

(2) Law Rep. 4 Eq. 537.

(3) 3 Y. &amp; C. Ex. 597.

(4) 6 App. Cas. 701.



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case, goes much further." I pause to make this observation, that, if this doctrine of consolidation be potentially applicable to two or more mortgages existing at the date of the assignment of the equity of redemption of one of them (and in the present case it is sought to apply it in that way), it is obvious that it is equally potentially applicable to mortgages not then in existence, and to estates of which the mortgagor was not then the owner, for although, no doubt, the one contingency is much more remote than the other, both alike rest on contingency and potentiality.

Then Lord *Blackburn* (1) makes this observation. Having referred to the case of *Jones v. Smith* (2), he says: "Even if it was established that in such a case the right to consolidate would be good against the assignee, it does not seem to me to follow that it would be good against an assignee of the equity of redemption of one of the estates made whilst the two mortgages were not yet vested in the same person, still less as against one made before the mortgage of the other estate existed."

Then his Lordship proceeded to cite *White v. Hillacre* (3), and said that the decision of the learned Baron in that case had "an appearance at least of good sense and of furthering justice, or perhaps I should say of refusing to further injustice, that to my mind is very persuasive."

The authorities, therefore, appear to me to stand in this way. There are two distinct decisions of Courts of jurisdiction co-ordinate with mine antagonistic to each other. The Court of Appeal treated *Beevor v. Luck* (4) as good law, but the House of Lords has expressed the gravest doubts as to the propriety of that decision. I feel myself, therefore, liberated from any binding authority of *Beevor v. Luck*, and at liberty, and therefore bound, to choose between the two conflicting decisions, and, for the reasons which I have already expressed, I have no hesitation in saying that the decision in *White v. Hillacre* is, in my opinion, consonant with the only principles upon which the Court can proceed, and that the decision in *Beevor v. Luck* is not consonant with those principles. I repeat that my decision rests on this—the purchaser of an equity of redemption from the mortgagor takes it subject to all the equities

(1) 6 App. Cas. 717.

(2) 2 Ves. 372.

(3) 3 Y. &amp; C. Ex. 597.

(4) Law Rep. 4 Eq. 537.



which affected it in the hands of the assignor at the time of the assignment, but not to any equities subsequently arising. The equity to consolidate, arising from a subsequent union in the same person of that mortgage with another, is not an equity which was then subsisting, and therefore it is not one of the equities subject to which the equity of redemption was purchased. That, I believe, determines the present case.

Of course the Plaintiff is entitled to consolidate his mortgages as against the mortgagor.

Solicitors for Plaintiff: *Burton, Yeates, & Hart.*

Solicitors for Defendants *Colman* and *Boustead*: *Hollams, Son, & Coward.*

Solicitors for Mortgagor: *Bloxams & Ellison.*

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*In re* WEARMOUTH CROWN GLASS COMPANY.

1882

Jan. 31.

*Company—Liquidation—Parish Rates—Apportionment—Public Health Act, 1875, s. 211.*

284 D 502

Parish rates were assessed on the 20th of April for the ensuing six months upon the premises of a company which was wound up on the 22nd of the following August, the business being subsequently carried on by the liquidators as a going concern:—

*Held*, that there was no power to apportion these rates under the *Apportionment Act*, and that there was no change in the occupation under the *Public Health Act*, since the liquidators were in possession under the direction of the Court; and, consequently, that the whole of the April rates must be proved for in the liquidation.

THIS was a motion on behalf of the liquidators of the *Wearmouth Crown Glass Company* for an injunction to restrain the Local Board and the Overseers of the Poor of *Southwick* from enforcing distress warrants for local district rates and poor-rates under orders for payment made by the magistrates for the county. On the 22nd of August, 1881, a resolution was passed by the company for a voluntary winding-up, and on the 24th of August an order was made for continuing the winding-up under the supervision of the Court, and two liquidators were appointed, who had since carried on the business of the company with the view to its being sold as a going concern.

On the 20th of April, 1881, the Local Board of *Southwick* made a general district rate for the ensuing six months, and £32 15s. was the sum assessed upon the company in respect of their premises. On the 19th of October, 1881, a further rate for the ensuing six months was made for the same amount. On the 23rd of April, 1881, the overseers of the poor of the said township made a rate for the ensuing six months, the amount assessed in respect of the companies premises being £43 13s. 4d., and on the 15th of October they made another rate for the ensuing six months amounting to £38 4s. 2d. None of these rates having been paid, summonses were issued against the liquidators and heard before the county justices on Saturday, the 17th of

December, when orders were made for payment of the proportion of the April rates from the 22nd of August to October, and the whole of the October rates, and costs.

The liquidators admitted their liability to pay the whole of the October rates, and tendered the amount, but they alleged that the magistrates had no jurisdiction to apportion the April rates, the whole of which were debts due from the company at the time of its being wound up, and that the local board and overseers must consequently prove for the amount as ordinary creditors in the liquidation. The tender having been refused, these proceedings were taken by the liquidators.

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*Waller, Q.C., and Bunting, for the liquidators:—*

We submit that rates are not apportionable, and that the April rates, which were assessed four months before the date of the winding-up, and are payable immediately upon being assessed, are debts of the company, and should be proved in the liquidation. In the case of *In re Albion Steel and Wire Company* (1), it was held that the rule in bankruptcy giving local rates due from the bankrupt priority over his other debts, did not apply to the case of a company in liquidation. There can be no apportionment of rates, which are payable on the day they are made. Rates do not accrue from day to day like payments provided for under the *Apportionment Act*.

*Romer, Q.C., and Gatey, for the Respondents:—*

The case of *In re Albion Steel and Wire Company* is explained by the Master of the Rolls in *In re Printing and Numerical Registering Company* (2), from which it would appear that the decision in the former case did not go so far as was there expressed. We submit, however, that under the *Public Health Act*, 1875 s. 211, sub-s. 3, an apportionment may be made, since there was in this case a change of occupation. The company were in possession up to the period of liquidation, and afterwards the liquidators occupied the premises and carried on the business for the benefit of the creditors and the shareholders. The rates, therefore, should be

(1) 7 Ch. D. 547.

(2) 8 Ch. D. 535.

KAY, J. appportioned in the same way that rent is appportioned. *In re*  
 1882 *South Kensington Co-operative Stores* (1); *In re West Hartlepool*  
*Iron Company* (2).

*In re*  
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 COMPANY.

KAY, J.:—

It is admitted that the Court of Chancery has no inherent power to apportion payments, and it is admitted that parish rates do not come within the *Apportionment Act*, but it is argued that a statutory power to apportion is to be found in the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), which provides by sect. 211, sub-sect. 3, that if any owner or occupier assessed or liable to any such rate ceases to be owner or occupier of the premises in respect whereof he is assessed or liable, before the end of the period for which the rate was made and before the same is fully paid off, he shall be liable to pay only such part of the rate as may be in proportion to the time during which he continues to be such owner or occupier; and in every such case if any person afterwards becomes owner or occupier of the premises during part of the said period, he shall pay such part of the rate as may be in proportion to the time during which he continues to be such owner or occupier, and the same shall be recovered from him in the same manner as if he had been originally assessed or liable. It is attempted to make that section applicable to this case, and it is said that only so much of the rates are provable in the winding-up as are applicable to that portion of time between the assessment of the April rates and the period at which the company was wound up, and that the remaining portion of the rates should be levied upon the liquidators, and although the property did not vest in the liquidators, it is said that they became different occupiers from the company who had carried on the business till the winding-up. I dissent entirely from that view. In my opinion the liquidators do not become different occupiers of the premises. They are simply officers of the Court, and their occupation is the occupation of the company. I must hold, therefore, that I have no power to apportion the rates; so that the whole of the rate assessed in April, and which was

(1) 17 Ch. D. 161.

(2) 34 L. T. (N.S.) 568.



due before the winding-up, can only be proved for in the liquidation. The costs of this application must be paid by the local authorities.

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By consent, the local board and overseers undertaking not to distrain, no order for an injunction was made.

Solicitors : *J. W. Hickin ; E. Scott.*

T. W. G.

CHITTY, J.

BURRARD v. CALISHER.

1882

Feb. 27.

[1878 B. 556.]

*Practice—Action—Further Consideration—Official Referee—Varying Report.*

Where, in an action which has by the judgment been referred to the official referee and in which further consideration has been adjourned, either party desires to vary the referee's report, he should serve the opposite party with a notice of motion to vary, such notice to be given for the usual motion day. The motion will then be adjourned, as a matter of course, to come on with the further consideration. Where further consideration has not been adjourned, the proceeding to vary may be either a motion or a summons.

THIS was an action for accounts on money-lending transactions. By the judgment, dated the 4th of February, 1881, the accounts were ordered to be taken by the official referee, and the further consideration of the action was adjourned. On the 19th of December, 1881, the official referee made his report, by which he found that a sum of £2450 10s. 10d. was due from the Defendant to the Plaintiff.

On the 23rd of January, 1882, upon an application of the Defendant, an order was made by Mr. Justice *Kay*, sitting for Mr. Justice *Chitty*, remitting the report to the official referee in order that he might state in separate items how the sum of £2450 10s. 10d. was made up; which he did by a further report, dated the 17th of February, 1882.

The action now came on upon further consideration, when, the Defendant being desirous of contesting some of the items of the official referee's further report, the question arose whether, as a matter of practice, a special application should not be made for that purpose.

*Romer, Q.C., and Levett, for the Plaintiff:—*

We now ask your Lordship to adopt the finding of the official referee, under s. 56 of the *Judicature Act*, 1873, which empowers the Court to adopt the referee's report either wholly or partially. Neither the Act nor the rules prescribe any special mode by which the Court is to be asked to adopt or vary the report; but if it is

desired to raise any objections to the report when the action comes on upon further consideration, it seems only proper that some notice of the particular objections upon which it is proposed to rely should be previously given, in order not to take the opposite party by surprise: *In re Brook* (1). This might be done by motion or summons.

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*Ince*, Q.C., and *Grosvenor Woods*, for the Defendant:—

We admit that some notice should be given. This might be done either by motion or summons to vary by the objecting party, which might come on with the further consideration. There would thus be a separate brief and separate evidence, so that the costs of the application could be dealt with separately from the general costs of the action.

[CHITTY, J., mentioned *Dunkirk Colliery Company v. Lever* (2).]

CHITTY, J.:—

In my opinion—and I wish to lay down this as the rule of practice I propose to adopt in my Court—where, in an action which has by the judgment been referred to the official referee, and in which the further consideration has been adjourned, either party to the action desires to vary the report, he should serve the opposite party with a notice of motion to vary. This notice of motion should be given for the usual motion-day in this branch of the Court, but when the motion is mentioned it will be ordered to be adjourned, as a matter of course, to come on with the further consideration. Where the further consideration has not been adjourned, then the practice which was laid down by the Master of the Rolls should be adopted; that is to say, the requisite notice should be given either by motion or by summons to vary. When there is a summons instead of a motion, the summons goes into Chambers, but if it is too heavy to be dealt with there, it is transferred to the list of non-witness causes, and comes on really as a part-heard cause. It is a matter for consideration whether in such a case as that some special rule should not be laid down to prevent the final trial of the action being unduly delayed.

(1) 29 W. R. 821.

(2) 9 Ch. D. 20.

CHITTY, J. His Lordship accordingly directed that the further consideration of the action should stand over to the following Monday (the usual day for hearing further considerations), to come on with a motion to vary the report; the notice of motion to be given for the preceding Friday (the usual motion day), but the motion to stand adjourned as a matter of course to come on with the further consideration.

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In pursuance of his Lordship's directions notice of motion to vary was given by the Defendant for the next motion day, when the motion was mentioned and thereupon ordered to be adjourned as above.

Solicitors: *Lawrence, Plews & Baker; G. S. & H. Brandon.*

G. I. F. C.

CHITTY, J.

# BECKETT v. SUTTON.

[1876 B. 72.]

1882  
March 4.  
—

*Partition Action—Sale—Parties not under Disability—Vesting Order—Appointing Person to convey—Partition Acts, 1868 and 1876—Trustee Extension Act, 1852 (15 & 16 Vict. c. 55), s. 1.*

Sect. 1 of the *Trustee Extension Act*, 1852 (15 & 16 Vict. c. 55), applies to sales under the *Partition Acts*, 1868 and 1876, and is not limited to cases of persons under disability.

THIS was an action for the partition or sale of certain real estate. The property had been sold under various orders in the action. One twelfth share of the property stood limited to the use of the Plaintiffs, *Edward Beckett* and *Caroline*, his wife, successively for life, with remainder to the use of the Plaintiffs, *Caroline Anna Beckett*, *Rosa Harriet Beckett*, and *Reginald Edward Beckett*, as tenants in common in tail, with cross remainders in tail, with an ultimate remainder to the use of the Plaintiff, *Edward Beckett*, in fee. The Plaintiff, *Reginald Edward Beckett*, was out of the jurisdiction. The Plaintiffs, *Caroline Anna Beckett* and *Rosa Harriet Beckett*, were both of age and able to convey.

A petition was now presented under the *Trustee Act*, 1850, and the *Trustee Extension Act*, 1852 (15 & 16 Vict. c. 55), asking for a declaration that the Plaintiffs, *Caroline Beckett*, *Caroline Anna*



*Beckett, Rosa Harriet Beckett, and Reginald Edward Beckett*, were to be deemed seised of the one twelfth share upon a trust within the meaning of the *Trustee Act*, 1850, and that the Plaintiff, *Edward Beckett*, might be appointed to convey for them.

The purchasers were made Respondents to the petition, and had been served but did not appear.

*Ince, Q.C.*, and *Theobald*, for the Petitioners:—

The declaration we ask for is based upon sect. 1 of the *Trustee Extension Act*, 1852 (15 & 16 Vict. c. 55), which enacts that when “any decree or order” shall have been made for the sale of any land “every person seised or possessed of such land,” being a party to the suit or proceeding in which such decree or order shall have been made and bound thereby, shall be deemed to be so seised or possessed “upon a trust within the meaning of the *Trustee Act*, 1850;” and that in every such case the Court may make a vesting order. But, instead of a vesting order, we ask for the appointment of a person to convey, under sect. 20 of the *Trustee Act*, 1850.

It may be doubted, however, whether the 1st section of the *Trustee Extension Act*, 1852, applies to sales under the *Partition Acts*, 1868 and 1876; for the Act of 1868, while it expressly includes, by sect. 7, the 30th section of the *Trustee Act*, 1850, is altogether silent as to the 1st section of the Act of 1852.

Moreover, even assuming that sect. 1 of the Act of 1852 does apply to sales under the *Partition Acts*, it seems doubtful whether the Court has jurisdiction to make a vesting order, or appoint a person to convey, where any of the persons seised upon a trust are, as in the present case, not under disability. From the last clause in the section, which says that the vesting order “shall have the same effect as if such person so seised, &c., had been free from all disability,” it would seem that the section is intended to apply only to cases of persons under disability. Upon this point there appears to be a difference of judicial opinion, Lord *Romilly* having held that the section does not apply where the parties are not under disability, and Vice-Chancellor *Bacon* having held that it does: *Seton* on Decrees (1).

(1) 4th Ed. p. 537.

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CHITTY, J. :—

The question I have to decide is whether the 1st section of the *Trustee Extension Act*, 1852,—by which it is enacted “That when any decree or order shall have been made by any Court of Equity directing the sale of any lands for any purpose whatever, every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby or being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the *Trustee Act*, 1850,”—does or does not apply to a sale under the *Partition Acts* of 1868 and 1876.

Now the words of the section are as wide as possible, and appear to me to apply—adopting the language the Legislature has used—to “any decree or order” by which the Court directs a sale. But some doubt is suggested as to this general application of the section on the following ground. The 7th section of the *Partition Act*, 1868, says that “sect. 30 of the *Trustee Act*, 1850, shall extend and apply to cases where, in suits for partition, the Court directs a sale instead of a division of the property ;” and it is said that the maxim *expressio unius exclusio alterius* should apply, and that accordingly, by implication, the operation of the *Trustee Extension Act*, 1852, must be held to be excluded. I decline, however, to adopt any such suggestion. The effect of the 7th section of the *Partition Act*, 1868, is to extend the 30th section of the *Trustee Act*, 1850, to cases in which it would not otherwise apply. That 30th section was so framed as to apply only to a partition proper, but the advantages of its application to a sale in a partition action were so apparent that it was deemed advisable to extend, by express enactment, its provisions to cases in which the Court under the Act of 1868 directs a sale instead of a partition. But that does not create the inference that the Legislature meant to repeal the comprehensive 1st section of the Act of 1852, the terms of which are sufficient to include a sale under any binding decree, although the jurisdiction to make the decree

is conferred by a subsequent Act of Parliament. In my opinion, CHITTY, J. therefore, that 1st section does apply to all sales directed by the Court under the Partition Acts.

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It has been suggested also that the 1st section of the Act of 1852 applies only to cases where the person seised, possessed or entitled, is under disability. But the language of the section is as clear as can be. It says that when "any" decree or order for sale has been made, "every person" seised, possessed or entitled, being a party to the suit or bound by the decree or order shall be deemed to be seised, possessed or entitled upon a trust: but then a doubt as to the general application of the section appears to have arisen from the language of the last clause, which says that the vesting order authorized by the section "shall have the same effect as if such person so seised or possessed or entitled had been free from all disability." The purport of that part of the section is merely to declare the effect of the vesting order, and the result is simply this—the Legislature says, in effect, there may be, among the persons bound by the decree or order, some who are under disability; in such cases the vesting order shall have the same effect as if the persons who are under disability were free from disability. In other words, to avoid any question as to the operation of the vesting order, the language of the last clause of the section is properly addressed to cases of persons under disability; the Legislature saying that the effect of the vesting order shall be the same as if such persons were seised, possessed or entitled free from all disability. The clause in fact merely describes what the effect of the order is to be in a certain hypothetical case. That is the view I take of the section; and, as I have already said, I refuse to adopt the construction which would by implication exclude sales under the Partition Acts from the operation of that section.

I therefore make an order according to the prayer of the petition.

Solicitor: *O. Richards.*

G. I. F. C.





The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January, 1882, will be as follows:—

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<b>ADMISSIONS</b> —Witness in bankruptcy - 580 <i>See BANKRUPTCY.</i> 7.	<b>APPORTIONMENT</b> — <i>Company—Liquidation—Parish Rates—Public Health Act, 1875, s. 211.</i> Parish rates were assessed on the 20th of April for the ensuing six months upon the premises of a company which was wound up on the 22nd of the following August, the business being subsequently carried on by the liquidators as a going concern:— <i>Held</i> , that there was no power to apportion these rates under the <i>Apportionment Act</i> , and that there was no change in the occupation under the <i>Public Health Act</i> , since the liquidators were in possession under the direction of the Court; and, consequently, that the whole of the April rates must be proved for in the liquidation. <i>In re WEARMOUTH CROWN GLASS COMPANY</i> 640
<b>AFTER-ACQUIRED PROPERTY</b> —Assignment of <i>See BANKRUPTCY.</i> 4. [342]	— Costs—Administration action - 552 <i>See PRACTICE.</i> 5.
— Bankruptcy—Discharged debtor - 140 <i>See BANKRUPTCY.</i> 8.	<b>ARBITRATION</b> — <i>Practice—Action—Reference to Arbitration—Enforcing Award—Rule of Court.</i> Where an action has been referred to an arbitrator by the Chancery Division it is not necessary to make the award a rule of Court before an order can be made founded on the award. <i>JONES v. WEDGEWOOD</i> - - - 56
— Will speaking from death - - 432 <i>See WILL.</i> 6.	<i>See also In re FORREST. BURROWS v. FORREST</i> [57, n.
<b>AMBIGUITY</b> —Contract—Agreement for lease <i>See LEASE.</i> [233]	
<b>AMENDMENT OF PROOF</b> - - - 394 <i>See BANKRUPTCY.</i> 10.	
<b>ANCIENT BUILDINGS</b> —Right of support - 281 <i>See SUPPORT.</i>	
<b>ANNUITY</b> —Perpetuity - - - 294 <i>See WILL.</i> 2.	
<b>ANTICIPATION</b> —Restraint on - - 277 <i>See HUSBAND AND WIFE.</i>	

**ARBITRATION**—*continued*.

2. — *Practice*—*Award*—*Motion to set aside*—*Objections to be specified*—*Common Law Procedure Act, 1852*—*Reg. Gen. Hil. Term, 1853, r. 169.*]  
A notice of motion in the Chancery Division to set aside the award of an arbitrator should specify the grounds of objection, by analogy to the practice under the *Common Law Procedure Act, 1852*: *Reg. Gen. Hil. Term, 1853, r. 169*: an objection on "good grounds" being insufficient. *MERCIER v. PEPPERELL* - - - - - 58

**ARMY AGENT**—*Notice to*—*Assignment of money payable on officer's retirement* - 17  
*See PRACTICE. 1.*

**ASSIGNMENT**—*After-acquired property*—*Bankruptcy* - - - - - 342  
*See BANKRUPTCY. 4.*

— *Equity of redemption*—*Consolidation of mortgages* - - - - - 630  
*See MORTGAGE. 1.*

**AUCTIONEER**—*Action against* - - - - - 326  
*See PRACTICE. 14.*

— *Sale by, with notice of adverse claim* - 86  
*See BAILMENT.*

**AWARD** - - - - - 56, 58  
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**BAILMENT**—*Jus tertii*—*Estoppel*—*Sale by Bailor for Bailee after Notice of adverse Claim*—*Right to Proceeds of Sale*—*Trustee in Bankruptcy*—*Auctioneer*—*Court of Bankruptcy*—*Jurisdiction*—*Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 72.*]  
Although in certain cases a bailee may set up the *jus tertii*, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against his bailor.—After the filing of a liquidation petition the holder of a registered bill of sale executed by the debtor instructed an auctioneer to take possession of the chattels comprised in it. The auctioneer took possession, and advertised the goods for sale on behalf of the bill of sale holder. The sale was stopped by injunction, and the auctioneer remained in possession of the goods on behalf of the receiver under the petition. On the appointment of a trustee the auctioneer held possession for him, and ultimately by his directions advertised the goods for sale, the advertisements and the catalogues of the goods being headed "In liquidation. By order of the trustee." The goods were sold, and the proceeds of sale were received by the auctioneer. The bill of sale holder gave him notice not to pay them to the trustee, and he declined to pay them over. The trustee applied to the Court of Bankruptcy for an order for payment to him, serving notice of his motion on the auctioneer only. On the hearing of this motion an order was made by consent that the money should be paid into Court, and the hearing adjourned, notice being meanwhile given to the bill of sale holder. Notice was served on him, but not a four days' notice as required by rule 50 of the Bankruptcy Rules, 1870, and he did not appear on the adjourned hearing. He had meanwhile commenced an action against the auctioneer for the proceeds of sale:—*Held* (affirming the decision of *Bacon, C.J.*), that the Court

**BAILMENT**—*continued*.

of Bankruptcy ought to exercise its jurisdiction under sect. 72 of the *Bankruptcy Act, 1869*, and that the money must be paid out to the trustee, on the ground that the auctioneer had, with full knowledge of the adverse claim, deliberately elected to sell the goods for the trustee, and was, therefore, estopped from denying his title.—*Biddle v. Bond* (6 B. & S. 225) distinguished. *Ex parte DAVIES. In re SADLER* - - - - - C. A. 86

**BANKRUPTCY**—*Act of Bankruptcy*—*Debtor's Summons*—*Adjudication of Bankruptcy*—*Convicted Felon*—*Statute 33 & 34 Vict. c. 23, s. 8.*]  
Notwithstanding the provision contained in sect. 8 of the Act 33 & 34 Vict. c. 23, that every convicted felon shall, during the time while he shall be subject to the operation of the Act, be incapable of alienating or charging any property, such a convict can pay a debt which is claimed by a debtor's summons issued and served on him after his conviction, and if he fails to pay the debt within the time limited by the summons, he will commit an act of bankruptcy, upon which an adjudication can be made against him. *Ex parte GRAVES. In re HARRIS* - - - - - C. A. 1

2. — *Appeal*—*Interpleader Order in Bankruptcy*—*Rehearing*—1 & 2 Will. 4, c. 58, s. 6—1 & 2 Vict. c. 45, s. 2—*Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), ss. 14, 17*—*Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 65, 71*—*Bankruptcy Rules, 1870, r. 50*—*Sheriff*—*Interpleader*—*Costs.*]  
Any order in interpleader made by the Chief Judge in Bankruptcy can be appealed from.—The proper mode for the sheriff to apply to the Court of Bankruptcy for an interpleader order under the Act 1 & 2 Will. 4, c. 58, is by motion, of which notice is served on the claimants, and on the hearing of the motion the Court can determine their rights, without first making an order that they attend and interplead.—A person against whom an order is made on his default in appearing may appeal from the order on its merits.—*Dodds v. Shepherd* (1 Ex. D. 75) considered.—On the hearing of a motion by a sheriff in the Court of Bankruptcy for an interpleader order, one of the claimants was represented by the managing clerk of his solicitors, who was not himself a solicitor. The Registrar, supposing him to be a solicitor, allowed him to cross-examine the witnesses on the other side, but, when he discovered the mistake, he declined to hear him as an advocate, and decided against his client, and he afterwards refused an application by the client for a rehearing:—*Held*, that the Registrar ought to have adjourned the case to give the client an opportunity of being represented by counsel or a solicitor, and that the client was entitled to a rehearing.—The sheriff's costs of the appeal were ordered to be paid by the party who should ultimately be decided to be in the wrong. *Ex parte STREETER. In re MORRIS* - - - - - C. A. 216

3. — *Appeal*—*Time*—*Notice to Registrar of County Court*—"Forthwith"—*Bankruptcy Rules, 1870, rr. 143, 144.*]  
When an act is required by a statute or a rule of Court to be done "forthwith," the word "forthwith" must be construed with regard to the object of the provision and the circumstances of the case.—The *London agents*



**BANKRUPTCY—continued.**

of the country solicitors of an appellant from an order made by a County Court in bankruptcy entered the appeal with the Registrar of Appeals in London on Friday, the 5th of August, the last possible day, but did not post a copy of the appeal notice to the country solicitors until the following day, and it was not received by them until Monday, the 8th of August, and on that day they sent a copy of the notice to the Registrar of the County Court:—*Held*, that the copy of the notice had not been sent to the Registrar of the County Court "forthwith" on entering the appeal as required by rule 144, and that consequently the appeal was out of time. *Ex parte LAMB. In re SOUTHAM* - - - **C. A. 169**

4. — *Assets—Bill of Sale—After-acquired Chattels—Covenant to assign—Bankruptcy—Liability—Order of Discharge—Bankruptcy Act, 1869* (32 & 33 Vict. c. 71), ss. 12, 31, 49, 125, sub-s. 10.] A debtor by bill of sale assigned for value to a creditor certain specified chattels at his place of business, "and all other chattels which might be or at any time thereafter be brought thereon in addition to or in substitution thereof." The debtor became bankrupt, and after his order of discharge brought other chattels upon the premises. The creditor did not prove for his debt in the bankruptcy:—*Held* (reversing the decision of *Hall, V.C.*), that the assignment of the after-acquired chattels, although absolute in form, amounted merely to a contract to assign for the breach of which the assignor incurred a liability provable in his bankruptcy, and from which he was released by the order of discharge; that consequently the goods brought on the premises after the order of discharge could not be seized by the creditor under his bill of sale.—Whether the same rule applies to a covenant in a marriage settlement to settle future property, *quære*. *COLLYER v. ISAACS* [**C. A. 342**]

5. — *Disclaimer by Trustee—Leasehold Property of Bankrupt—Fixtures—License by Lessor to remove after Expiration of Term—Removal by Trustee before Disclaimer—Right of Lessor—Bankruptcy Act, 1869* (32 & 33 Vict. c. 71), s. 23.] A lease contained a proviso that the lessee, his executors, administrators, and assigns, might at any time or times during the continuance of the term, or within twelve months from the expiration or other sooner determination thereof, but not afterwards, remove any buildings or machinery which he or they might have erected on the demised premises for trade purposes. The lessee filed a liquidation petition, and a trustee in the liquidation sold the trade machinery and fixtures, which were then removed by the purchaser. The trustee afterwards disclaimed the lease:—*Held*, by *Bacon, C.J.*, that the removal of the fixtures was justified by the proviso in the lease, and that the trustee, notwithstanding the disclaimer, was entitled to retain the proceeds of sale.—*Held*, by the Court of Appeal, that, the disclaimer having, by virtue of sect. 23, the operation of a surrender of the lease as from the date of the appointment of the trustee, the proviso was, by construction of law, with all the other provisions of the lease, put an end to before the removal, and consequently that the removal could not be justified, and the

**BANKRUPTCY—continued.**

lessor was entitled to the proceeds of sale. *Ex parte GLEGG. In re LATHAM* - - **C. A. 7**

6. — *Disclaimer by Trustee—Leasehold Interest of Bankrupt—Leave of Court—Appeal after Execution of Disclaimer—Bankruptcy Act, 1869* (32 & 33 Vict. c. 71), s. 23—*Bankruptcy Rules, 1871, r. 28.*] After unconditional leave has been given by the Court to a trustee in bankruptcy to disclaim a lease of the bankrupt, and the trustee has executed a disclaimer, it is too late for the lessor to appeal from the order even for the purpose of getting conditions imposed on the trustee. The Court of Appeal has then no power to impose conditions. If the lessor desires to appeal from such an order, he ought to apply when it is made for a stay of proceedings under it.—*Ex parte DITTON* (3 Ch. D. 459) followed. *Ex parte SADLER. In re HAWES* - - - **C. A. 122**

7. — *Fraudulent Preference—Pressure by Creditor—Bankruptcy Act, 1869, s. 92—Evidence—Service of Copy of Deposition on File—Costs—Bankruptcy Rules, 1870, r. 50.*] On the 17th of February a trader told one of his creditors that he was about to stop payment. The creditor then pressed for security for his debt, and threatened to commence proceedings against the debtor at once, if he did not fulfil a verbal promise which he had, on the 17th of January, when the debt was contracted, made to supply the creditor with goods, or their equivalent, as security. The creditor had on the 14th of February, before he knew that the debtor was about to stop payment, pressed the debtor for the promised security, and the debtor had then again promised to give it. On the 19th of February the debtor delivered two bills of exchange, accepted by some other firms, to a third person, telling him to hand them to the creditor. On the 24th of February the debtor filed a liquidation petition, and on the 10th of March he was adjudicated a bankrupt:—*Held*, that the delivery of the bills of exchange amounted to a fraudulent preference of the creditor, and that it was void as against the trustee in the bankruptcy under sect. 92.—*Per Jessel, M.R.*: Inasmuch as the threat to bring an action could have no influence on a man who was just about to become bankrupt, there was no real pressure exerted by the creditor on the 17th of February, and the prior pressure on the 14th of February, having been ineffectual, could not be taken into account.—A deposition of a witness, taken in the Court of Bankruptcy for one purpose, and filed, may be used against him as an admission in any other proceeding in the matter of the same bankruptcy.—But when a party to an application in the Court of Bankruptcy gives notice to his opponent of his intention to use as evidence on the hearing of the application a deposition which is on the file, though it was originally taken for another purpose, he ought not to serve his opponent with a copy of it, and if he does so, he will not, though successful on the application, be allowed the costs of the copy thus served. *Ex parte HALL. In re COOPER* - - **C. A. 580**

8. — *Liquidation by Arrangement—Close of Liquidation—Discharge of Debtor—Sale of Estate to Trustee—Right to after-acquired Property—Costs—Appeal for Costs—Bankruptcy Act, 1869*

**BANKRUPTCY—continued.**

(32 & 33 Vict. c. 71), ss. 20, 28, 125.] The creditors of a liquidating debtor in 1877 passed a special resolution authorizing the sale of his estate to the trustee at such a price as would pay a dividend of 5s. in the pound to the creditors, and also the costs of the liquidation. The resolution was sanctioned by the Court, and was carried out by the trustee. The debtor was not a party to the arrangement, and did not know of it for some time afterwards. The creditors did not pass any formal resolution fixing the close of the liquidation, or granting the debtor a discharge, but he commenced another business. In 1881 this came to the knowledge of the trustee, and he thereupon took possession of the debtor's stock-in-trade, claiming it on behalf of the creditors under the liquidation:—*Held*, that the resolution did not amount in substance to a close of the liquidation or a discharge of the debtor, and that consequently the trustee was entitled to the debtor's after-acquired property for the benefit of the creditors.—*But, held*, that, under the circumstances, the costs might properly be the subject of appeal, and that the debtor's costs must be paid out of the estate, and (reversing the decision of *Bacon, C.J.*), that the trustee's costs must also be allowed out of the estate.—*Ex parte Tinker* (Law Rep. 9 Ch. 716) distinguished. *Ex parte WAINWRIGHT*. *In re WAINWRIGHT* - - - **C. A. 140**

9. — *Liquidation Proceedings—Transfer to another Court—Meetings of Joint and Separate Creditors—Bankruptcy Rules*, 1870, rr. 285, 288.] The proceedings under a liquidation petition filed by partners cannot be transferred from the Court in which they were commenced to another Court, unless a resolution directing the transfer is passed, not only by a general meeting of the joint creditors, but also by separate general meetings of the separate creditors of each partner.—Rule 285 applies to all cases in which meetings of creditors have to be held under a liquidation petition by partners, and in all such cases separate meetings must be held of the joint creditors and of the separate creditors of each partner. *Ex parte HORROCKS*. *In re WOOD* - - - **C. A. 367**

10. — *Proof—Partnership—Composition—Joint Creditors—Creditors with Joint and Separate Security—Valuation of Proof for Joint Debt—Close of Composition—Action for Redemption of Security—Claim to retain Separate Security—Amendment of Proof.*] *B. & Co.* were creditors of a partnership for £2400, for which they held a security comprising joint property of the firm and also separate property of one of the partners. The firm being in difficulties, the joint creditors agreed to accept a composition, and *B. & Co.* valued their security at £800, and proved and received the composition upon the balance. Subsequently they received from their security more than £800 and interest from the date of valuation. Four years after the close of the composition the debtors brought an action to redeem their security. *B. & Co.* claimed to retain the security on the separate property until they had received payment in full of their claim, on the ground that they need not have deducted the separate property:—*Held*, by *Jessel, M.R.*, that *B. & Co.* having received £800 from the security and accepted the composition

**BANKRUPTCY—continued.**

on the balance, their whole debt was discharged, and they could not retain the separate security.—This decision affirmed on appeal, on the ground that although *B. & Co.* need not have deducted the value of the separate security, yet, inasmuch as the composition had been fixed, and the whole proceeding in the composition had been taken and completed upon the footing of the valuation of the compound security at £800, it was too late to upset the transaction:—*Held*, that leave to amend the proof could not now be given, whatever might have been the case had a proper application for that purpose been made during the pendency of the composition proceedings. *COULDERY v. BARTNUM* - - - **C. A. 394**

11. — *Proof—Secured Creditor—Deduction of Value of Security—Security on Lease of Bankrupt and former Partner.*] The rule as to what securities a secured creditor of a bankrupt is bound to value and deduct on proving against the bankrupt's estate, explained.—Two partners, who were interested in equal shares in the business of the partnership, dissolved partnership. They had carried on business at some mills, of which they held a lease, granted to them, their executors, administrators, and assigns. On the dissolution, the partnership assets, other than the lease and the fixtures, were divided equally between the two partners. It was agreed that one of them should be entitled to carry on the business for seven years on his own account, and that he should pay the debts of the firm and indemnify the retiring partner against them. The retiring partner lent the other the value of his moiety of the partnership assets (other than the lease and fixtures) and granted him a lease for seven years of his moiety of the mills and fixtures. The original lease was deposited by the continuing and the retiring partners with the bankers of the former, as security for the balance which might for the time being be due from him to them, it being expressly provided that the retiring partner should be liable to the bankers only as a surety for the other. The continuing partner, before the end of the seven years, filed a liquidation petition.—*Held*, that, as to a moiety of the lease and fixtures, the bankers' security was upon separate estate of the liquidating debtor, and that, before proving in the liquidation for the balance due to them by him, they must deduct a moiety of the value of the lease and fixtures.—Decision of *Bacon, C.J.*, affirmed. *Ex parte WEST RIDING UNION BANKING COMPANY*. *In re TURNER* - - - **C. A. 105**

12. — *Protected Transaction—Post-dated Cheque—Bankruptcy of Payee before Date of Cheque—Duty of Drawer to stop Cheque—Holder for Value—Banker and Customer—Payment of Cheque or Bill to Customer's Credit—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 94.*] The drawer of a post-dated cheque given for value is under no obligation to stop its payment before its date for the benefit of a third person.—If, for instance, before the date of payment the drawer receives notice of an adjudication of bankruptcy, made against the payee since the delivery of the cheque to him upon an act of bankruptcy committed by him before the delivery, he is not bound, for the benefit of the bankrupt's creditors, to give notice



**BANKRUPTCY—continued.**

to his bankers not to pay the cheque, and thus expose himself to the risk of an action by a *bonâ fide* holder of the cheque for value.—If the cheque was originally delivered by the drawer to the payee, in good faith and for value, and without notice of an act of bankruptcy previously committed by the payee, on which an adjudication is subsequently made, the transaction is protected by sect. 94 (sub-sect. 3) of the *Bankruptcy Act*, 1869, and the trustee in the bankruptcy cannot recover the amount of the cheque from the drawer.—Decision of *Bacon*, C.J., reversed.—When a customer pays a cheque to his bankers with the intention that the amount of it shall be at once placed to his credit, and the bankers carry the amount to his credit accordingly, they become immediately holders of the cheque for value, even though the customer's account is not overdrawn. *Ex parte RICHDALE. In re PALMER* C. A. 409

13. — *Voluntary Settlement—Trader—Intent to delay Creditors—Bankruptcy Act* (32 & 33 Vict. c. 71), s. 91—13 Eliz. c. 5—*Costs—Trustees.*] In determining whether a trader who has executed a voluntary settlement was, within the meaning of sect. 91 of the *Bankruptcy Act*, 1869, "at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement," the value of the implements of his trade and of the goodwill of his business is not, if he was intending to continue his business, to be taken into account.—At any rate, if that value is to be taken into account, it can only be such a value as would be realized at a forced sale.—*Per Lindley, L.J.*: It is essential that the settlor should be able to pay his debts in the way in which he is proposing to pay them, *i.e.*, in the ordinary course of his business, if he is proposing to continue it.—A trader, who had for many years carried on the business of a baker, and had saved some money, being about to purchase a grocery business, which he intended to carry on in addition to the other, made a voluntary settlement of the bulk of his property for the benefit of his wife and children. He afterwards bought the grocery business, and carried it on for about six months, but lost money by it. He then sold it for as much money as he had given for it, and afterwards carried on the baker's business alone, until, about three years after the execution of the settlement, he filed a liquidation petition, his liabilities largely exceeding his assets. The debts which he owed at the date of the settlement had been all paid:—*Held*, that, independently of the question whether he was solvent at the date of the settlement, the settlement was void as against the trustee in the liquidation under the statute 13 Eliz. c. 5, on the ground that it was evidently executed with the view of putting the settlor's property out of the reach of his creditors in case he should fail in the speculation on which he was about to enter in carrying on a new business of which he knew nothing.—*Mackay v. Douglas* (Law Rep. 14 Eq. 106) approved and followed.—*Held*, also, that, under the circumstances, the settlement was void against the trustee in the liquidation under sect. 91 of the *Bankruptcy Act*, 1869.—Decision of *Bacon*, C.J., reversed.—The Judge of the County Court set aside the

**BANKRUPTCY—continued.**

settlement. He gave the trustee in the liquidation his costs out of the debtor's estate, but made no order as to the costs of the trustees of the settlement. The trustees of the settlement appealed to the Chief Judge, who discharged the order of the County Court. The Court of Appeal restored the order of the County Court.—*Held*, that the trustees of the settlement ought to have been satisfied with the decision of the County Court, and that they must bear their own costs of both appeals, and must pay the costs of the trustee in the liquidation of both appeals. *Ex parte RUSSELL. In re BUTTERWORTH* C. A. 588

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**BILL OF SALE—Statement of Consideration—Bills of Sale Act, 1878** (41 & 42 Vict. c. 31), s. 8.] A bill of sale of chattels, dated the 23rd of March, was expressed to be made "in consideration of £50 by the assignee paid to the assignor at or before the execution hereof." In fact only £21 10s. was paid to the assignor on the execution of the deed, £3 10s. being retained by the assignee for the expenses of the deed, and £25 being also retained and paid by him on the 30th of March to the landlord of the assignor's house, in which the chattels comprised in the deed were, for two quarters' rent for the quarters ending respectively the 25th of March and the 24th of June. The rent of the house was payable quarterly, but there was nothing to shew that it was payable in advance. The £3 10s. and the £25 were retained upon the written request of the assignor dated the day of the execution of the deed. On the 25th of April the assignor filed a liquidation petition, and the trustee in the liquidation claimed the goods, on the ground that the consideration for the deed had not been stated in it in compliance with sect. 8 of the *Bills of Sale Act*, 1878:—*Held* by the Court of Appeal (reversing the decision of *Bacon*, C.J.) that the consideration was not truly stated in the deed, and that it was, therefore, void as against the trustee, 1, because the £25 was not paid to the assignor, but only agreed to be paid on his behalf; 2, because, even if the £25 were taken to have been paid to the assignor, it was not paid "at or before the execution" of the deed.—*Ex parte National*

**BILL OF SALE—continued.**

*Mercantile Bank* (15 Ch. D. 42) and *Ex parte Challinor* (16 Ch. D. 260) explained. *Ex parte ROLPH. In re SPINDLER* - - - **C. A. 98**

2. — *Statement of Consideration—Deduction of Expenses—Bills of Sale Act, 1878* (41 & 42 Vict. c. 31), s. 8—*Appeal—Evidence—Duty of Appellant—Right to raise new Point in Court of Appeal.*]  
If the amount of the expenses incident to the preparation of a bill of sale, given by way of mortgage, is deducted from the sum stated in it as the consideration, and the balance only is actually paid by the lender to the borrower, the consideration is not truly stated so as to satisfy sect. 8 of the *Bills of Sale Act, 1878*.—*Ex parte National Mercantile Bank* (15 Ch. D. 42) and *Ex parte Challinor* (16 Ch. D. 260) must be treated as binding authorities only in so far as they decide that, if part of the sum stated in a bill of sale as the consideration is, by the grantor's direction, given at the time of the execution of the deed, applied in satisfying a then existing debt due by him, the money so applied may be properly stated in the deed to be money then paid to him.—It is the duty of an appellant to bring before the Court of Appeal the whole of the evidence, oral as well as written, on which the order appealed from was founded, and if he does not do this, his appeal ought to be dismissed.—The Court of Appeal, however, has power, by way of indulgence, in a case where a note of oral evidence has been accidentally lost, to allow that evidence to be taken over again.—An appellant will not be allowed to raise in the Court of Appeal a point which he did not raise in the Court below, even though there is some evidence in support of it, if the nature of that evidence is such that, by any possibility, the respondent might have been able to rebut it if the point had been raised originally. *Ex parte FIRTH. In re COWBURN* - - - **C. A. 419**

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*See CHARITY.*

— *Jennings v. Jordan* (6 App. Cas. 698) considered - - - **630**  
*See MORTGAGE. 1.*

— *Labouchere v. Dawson* (Law Rep. 13 Eq. 322) distinguished - - - **355**  
*See GOODWILL.*

— *Leigh v. Leigh* (15 Ves. 92) distinguished **[520]**  
*See WILL. 5.*

— *Mackay v. Douglas* (Law Rep. 14 Eq. 106) approved and followed - - - **588**  
*See BANKRUPTCY. 13.*

— *Malcolm v. Hodgkinson* (Law Rep. 8 Q. B. 209) followed - - - **457**  
*See COMPANY. 3.*

— *Nash, In re* (16 Ch. D. 503), not followed **[384]**  
*See TRUSTEE ACTS. 1.*

— *National Mercantile Bank, Ex parte* (15 Ch. D. 42), explained - - - **98, 419**  
*See BILL OF SALE. 1, 2.*

— *Newton v. Chorlton* (10 Hare, 646) followed *See PRINCIPAL AND SURETY.* **[615]**

— *Paul v. Paul* (15 Ch. D. 580) not followed **[47]**  
*See SETTLEMENT. 1.*

— *Penysyflog Mining Company, Re* (30 L. T. 861), considered - - - **118**  
*See COMPANY. 1.*

— *Slade v. Fooks* (9 Sim. 386) followed - **201**  
*See WILL. 4.*

— *Tinker, Ex parte* (Law Rep. 9 Ch. 716), distinguished - - - **140**  
*See BANKRUPTCY. 8.*

— *Vint v. Paget* (2 De G. & J. 611) distinguished - - - **630**  
*See MORTGAGE. 1.*

— *Webster v. British Empire Mutual Life Assurance Company* (15 Ch. D. 169) commented on - - - **534**  
*See PRACTICE. 17.*

— *White v. Hillacre* (1 Y. & C. Ex. 597) approved and followed - - - **630**  
*See MORTGAGE. 1.*

— *Williams v. Owen* (13 Sim. 597) not followed - - - **615**  
*See PRINCIPAL AND SURETY.*

— *Williamson, Ex parte* (Law Rep. 5 Ch. 309), observed upon - - - **478**  
*See RAILWAY COMPANY. 1.*

**CASES—continued.**

— *Young v. Brassey* (1 Ch. D. 277) not followed - - - 460  
See PRACTICE. 19.

**CHAMBERS**—Practice in - - - 326, 516  
See PRACTICE. 2, 14.

**CHARGING ORDER**—Solicitor's lien - - 311  
See SOLICITOR. 2.

**CHARITY**—*Mortmain Act*—*Charitable Gift—Debt payable out of Real Assets—Hiring Rooms.*] A settlor by deed covenanted to pay within twelve months the sum of £20,000 to trustees on trust for his wife for her life, with remainder to the settlor for his life, with remainder as his wife should by will appoint. The wife by her will appointed the £20,000 to the same trustees on trust to pay thereout legacies amounting to £2000 and certain life annuities, and to pay the residue as she should by deed appoint. By a deed-poll she appointed the residue to charitable uses. All the instruments were executed at the same time. The settlor survived his wife and died, not having paid the £20,000. Part of his estate at his death consisted of impure personality, and the pure personality would be insufficient for payment of the £20,000:—*Held* (reversing the decision of *Bacon, V.C.*), that the £20,000 was a mere debt from the settlor's estate, and though it would be in part payable to the trustees for the charity out of the proceeds of land, the gift of the residue to charitable uses was not in any part void under the *Mortmain Act*.—A direction to hire rooms does not bring a gift within the *Mortmain Act*.—*Jeffries v. Alexander* (8 H. L. C. 594) considered. *In re ROBSON. EMLEY v. DAVIDSON* - C. A. 156

**CHEQUE**—Post-dated—Bankruptcy of payee 409  
See BANKRUPTCY. 12.

**CHILD**—Devise by father to—Death of child 612  
See WILL. 7.

**CLASS**—Perpetuity—Will - - - 294  
See WILL. 2.

— Time of ascertaining - - - 444  
See WILL. 3.

**CLOSE OF LIQUIDATION** - - - 140  
See BANKRUPTCY. 8.

**COLONY**—User of invention in - - - 268  
See PATENT. 1.

**COMPANY**—*Winding-up—Companies Act, 1862, s. 115—Examination by Liquidator—by Contributories—Witness—Locus Standi of, to appeal.*] The only ground on which a witness summoned to attend for examination can contest the validity of the summons is a want of jurisdiction to issue the summons or make the order. If the jurisdiction exists, a witness has no *locus standi* to appeal against the order.—The examination under the 115th section of the *Companies Act, 1862*, is as a general rule entrusted to the liquidator, but it is discretionary with the Judge whether he will entrust either the whole or any part of the examination to creditors or contributories, and whether he will or will not confine that examination within certain limits.—*Re Penysylog Mining Company* (30 L. T. (N.S.) 861) considered. *In re SILKSTONE and DODWORTH COAL and IRON COMPANY. WHITWORTH'S CASE* - - - C. A. 118

2. — *Winding-up—Jurisdiction—Applica-*

**COMPANY—continued.**

*tion by Stranger—Bankrupt Contributory—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 77.*] *R.*, a contributory, became bankrupt. After this he took out a summons asking that the official liquidator might be directed to take proceedings against a director to recover sums of money alleged to have been improperly received by him. *Fry, J.*, made an order that on *R.*'s depositing £100 the liquidator should take the opinion of counsel on the case alleged against the director, and on obtaining his opinion should apply to the Judge for directions. Two contributories and creditors who had liberty to attend proceedings appealed from this order:—*Held*, by the Court of Appeal, that *R.*, having become bankrupt, was a stranger to the company—that there was no jurisdiction to make any order on his application, and that the order must therefore be discharged without any regard to the question whether it was right or wrong on the merits. *In re CAPE BRETON COMPANY* - - - C. A. 77

3. — *Winding-up Petition—Practice—Subsequent Petition by same Petitioner for Liquidation of his own Affairs—Security for Costs.*] After the presentation and before the hearing of a winding-up petition, the petitioner filed a petition for the liquidation of his own affairs under the 125th and 126th sections of the *Bankruptcy Act, 1869* (32 & 33 Vict. c. 71):—*Held*, that he must give security for costs in the winding-up petition.—*Malcolm v. Hodgkinson* (Law Rep. 8 Q. B. 209) and *Brocklebank v. King's Lynn Steamship Company* (3 C. P. D. 365) followed. *In re CARTA PARA MINING COMPANY* - - - 457

— Insurance company - - - 39  
See INSURANCE COMPANY.

— Railway company - - - 478, 559  
See RAILWAY COMPANY. 1, 2.

— Winding-up—Apportionment of rates 640  
See APPORTIONMENT.

**COMPOSITION** - - - 394  
See BANKRUPTCY. 10.

**COMPULSORY PURCHASE**—Minerals—Railway company - - - 559  
See RAILWAY COMPANY. 2.

**CONDITIONAL DEBT**—Garnishee order - 508  
See PRACTICE. 10.

**CONSIDERATION**—Bill of sale - - 98, 419  
See BILL OF SALE. 1, 2.

**CONSOLIDATION OF MORTGAGES** - - 630  
See MORTGAGE. 1.

**CONSTRUCTIVE TRUST**—Solicitor - - 207  
See SOLICITOR. 1.

**CONTRACT**—Privy of - - - 246  
See COVENANT. 2.

**CONTRACTOR**—Liability of - - - 281  
See SUPPORT.

**CONVERSION**—Sale—Partition suit - 302  
See PARTITION SUIT.

**CONVICTED FELON** - - - 1  
See BANKRUPTCY. 1.

**COPY**—Depositions in bankruptcy—Service 580  
See BANKRUPTCY. 7.

— Pleadings—Costs - - - 72  
See PRACTICE. 6.



<b>COSTS</b> —Appeal for - - - -	140
<i>See</i> <b>BANKRUPTCY.</b> 8.	
— Appeal—Cross notice - - - -	17
<i>See</i> <b>PRACTICE.</b> 1.	
— Apportionment—Administration action	552
<i>See</i> <b>PRACTICE.</b> 5.	
— Bankruptcy - - - -	140, 216, 588
<i>See</i> <b>BANKRUPTCY.</b> 2, 8, 13.	
— Copies of pleadings - - - -	72
<i>See</i> <b>PRACTICE.</b> 6.	
— Payment by solicitor personally - -	94
<i>See</i> <b>PRACTICE.</b> 12.	
— Security for—Appeal - - - -	84
<i>See</i> <b>PRACTICE.</b> 3.	
— Security for—Next friend of married woman	
<i>See</i> <b>PRACTICE.</b> 12.	94
— Shorthand notes of evidence - - - -	80
<i>See</i> <b>PRACTICE.</b> 7.	
— Solicitor's lien - - - -	311
<i>See</i> <b>SOLICITOR.</b> 2.	
— Trustee—Appeal - - - -	588
<i>See</i> <b>BANKRUPTCY.</b> 13.	
<b>COUNTER-CLAIM</b> - - - -	473
<i>See</i> <b>PRACTICE.</b> 8.	
<b>COUSINS</b> —Second cousins—Will - - -	201
<i>See</i> <b>WILL.</b> 4.	

**COVENANT**—*Beershop—Off License—Notice—Damages.*] Upon the sale, in 1863, to A., for the purposes of a public-house, of part of an estate intended to be laid out for building, the trustees of the estate covenanted with A., his heirs and assigns, that they, their heirs and assigns, would not thereafter sell any portions of the estate without requiring the purchaser to enter into a covenant “not to erect thereon or use or permit to be used any building to be erected thereon as a tavern, public-house, or beershop.”—Further portions of the estate were sold in 1870 by the then trustees to G., who covenanted with the vendors not to use or permit to be used any building erected on the land and premises intended to be thereby assured as a tavern, public-house, or beershop. The rest of the estate was sold to other persons.—In 1879 H. purchased from G. part of the land comprised in G.’s purchase of 1870, and entered into a covenant with G., in terms similar to those of the covenant in the deed of 1870.—I., a yearly tenant under H. of one of the houses, having obtained an “off license,” sold under it beer which was not drunk upon the premises:—*Held*, that the property was bound by the restrictive covenant entered into by the vendors in 1863, and that B., an assign of A., was entitled to an injunction and damages against H. and I., in respect of the breach of covenant in selling beer under an “off license.” *NICOLL v. FENNING* - - - 258

2. — *Privy of Contract—Covenant running with Property.*] A patentee assigned letters patent to A. and B., who covenanted with him that they, their executors, administrators, and assigns would use their best endeavours to introduce the invention by granting licenses or working the patent or selling it, and that the patentee should be entitled to receive £5 per cent. of all net profits, whether arising from royalties, sale, or otherwise, which should be received by A. and B.

# **COVENANT—continued.**

or the survivor of them, or the executors or administrators of the survivor, their or his assigns, and that an account of profits should be rendered yearly to the patentee, and his share of profits paid to him by A. and B. and the survivor of them, and the executors or administrators of such survivor, their or his assigns, with a proviso that after a sale had been made of the patent the interest of the patentee in the profits should cease, and a final account be come to. A. and B. had taken the assignment with a view to forming a company to work the patent. The company was formed and the patent made over to them. The patentee sued the company for an account of profits. The company demurred, on the ground that there was no privity between them and the Plaintiff, and that the Plaintiff’s right, if any, was against A. and B. only:—*Held*, by Bacon, V.C., and by the Court of Appeal, that the Plaintiff could sue the company for an account of profits, for that the stipulations of the assignment to A. and B. amounted to a contract, that the owners for the time being of the patent should account for and pay to the Plaintiff a share of profits unless a sale within the meaning of the deed was effected, and that no person taking the patent with notice of this contract could refuse to give effect to it. *WERDERMAN v. SOCIÉTÉ GÉNÉRALE D’ÉLECTRICITÉ* - - - C. A. 246

— To pay premiums on policy—Surety - 615  
    *See* **PRINCIPAL AND SURETY.**

— To settle - - - - 342  
    *See* **BANKRUPTCY.** 4.

**CROSS NOTICE**—Appeal - - - 17  
    *See* **PRACTICE.** 1.

**DAMAGES**—Sale of land—Vendor only entitled to moiety - - - 175  
    *See* **VENDOR AND PURCHASER.**

— Slander of title - - - - 386  
    *See* **PATENT.** 2.

**DE BENE ESSE**—Evidence - - - 224  
    *See* **PRACTICE.** 9.

**DEATH**—Before testator - - - 470, 612  
    *See* **WILL.** 1, 7.

**DEBT**—Payable out of real estate - - 156  
    *See* **CHARITY.**

— Payment of, by felon - - - 1  
    *See* **BANKRUPTCY.** 1.

**DEBTOR AND CREDITOR**—Garnishee order 508  
    *See* **PRACTICE.** 10.

**DEBTOR’S SUMMONS**—Felon - - - 1  
    *See* **BANKRUPTCY.** 1.

— Partner on judgment against firm - 124  
    *See* **PRACTICE.** 18.

**DECREE**—Foreclosure - - - 49  
    *See* **MORTGAGE.** 2.

**DELAYING CREDITORS** - - - 588  
    *See* **BANKRUPTCY.** 13.

**DEMURRER** - - - - 246  
    *See* **PRACTICE.** 15.

**DEPOSITION**—Witness in bankruptcy—Admission—Service of copy - - - 580  
    *See* **BANKRUPTCY.** 7.



<b>DISCHARGE</b> —Bankruptcy - - -	342
See BANKRUPTCY. 4.	
<b>DISCHARGE OF DEBTOR</b> - - -	140
See BANKRUPTCY. 8.	
<b>DISCLAIMER</b> —Trustee in bankruptcy -	7, 122
See BANKRUPTCY. 5, 6.	
<b>DRAWER OF CHEQUE</b> —Bankruptcy of payee—	
Duty to stop cheque - - -	409
See BANKRUPTCY. 12.	

**EASEMENT**—*Foreshore*—*Prescription Act* (2 & 3 Will. 4, c. 71), s. 8.—“*Person entitled to any Reversion*”—*Building Agreement by Tenant for Life*—*Amendment of Pleadings*—*Practice*.] In an action to restrain the removal of shingle from, and the placing of bathing-machines upon, a part of the foreshore of the sea at *M.*, the Plaintiff claimed to be tenant in possession of the *locus in quo* under a building agreement granted him by the lord of the manor of *M.*, who was tenant for life of the property under a settlement. By his statement of defence the Defendant set up a forty years’ uninterrupted user and enjoyment of the *locus in quo* by himself and his predecessors in title for the purposes complained of, and denied that the Plaintiff was or ever had been in possession of the *locus in quo* “save subject to the right of the Defendant.” At the trial, *Fry, J.*, refused the Defendant leave to amend his statement of defence by striking out the qualifying words, so as to make his denial of the Plaintiff’s possession an unqualified one:—*Held*, on appeal, that the amendment ought to have been allowed.—*Golding v. Wharton Saltworks Company* (1 Q. B. D. 374) explained.—*Held*, also, per *Fry, J.*, that the words “person entitled to any reversion” in the 8th section of the *Prescription Act* (2 & 3 Will. 4, c. 71) included a person entitled as a remainderman; that the Plaintiff, being in possession of the *locus in quo* under the agreement at least as tenant at will to the reversioner, was also a person “entitled to any reversion” within the section, and could therefore maintain the action.—But *held*, by the Court of Appeal, 1. That on the true construction of the building agreement the Plaintiff had no estate whatever in the *locus in quo*, but only a right of entry thereon for the purposes of that agreement, and therefore could not maintain the action; 2. That it was, therefore, unnecessary to decide the question raised on the 8th section of the *Prescription Act*; but their Lordships intimated that it must not be concluded that they agreed with the decision of the Court below on that point. LAIRD *v.* BRIGGS

[C. A. 22

2.—*Light*—*Enjoyment*—*Interruption*—*Notice*—*Prescription Act* (2 & 3 Will. 4, c. 71), s. 4.—*Evidence*—*Onus probandi*.] *Seem*, that the person who asserts that an alleged twenty years’ enjoyment of light has been interrupted during that period is bound, under sect. 4 of the *Prescription Act*, to prove that some notice (other than that which arises from the mere existence of a physical obstruction) was given to the person interrupted of the person by whose authority the interruption was made.—A Plaintiff who alleges a twenty years’ enjoyment of light must prove affirmatively a *prima facie* case of enjoyment. But, when he has done this, the Defendant may

**EASEMENT**—*continued*.

displace the *prima facie* case, either by proving the existence of an obstruction at the commencement of the twenty years, or a statutory interruption of the enjoyment at some time during the twenty years, or by shewing by other evidence that the Plaintiff’s evidence of enjoyment cannot be relied upon. In either way the Defendant will discharge the *onus* which is cast on him. SEDDON *v.* BANK OF BOLTON - - - 462

**ECCLESIASTICAL COMMISSIONERS**—Land of  
See SUPPORT. [281

**ENFORCING AWARD**—Making award a rule of Court - - - 56  
See ARBITRATION. 1.

**EQUITY OF REDEMPTION**—Assignment of—  
Consolidation of mortgages - 630  
See MORTGAGE. 1.

**ESTOPPEL**—Bailee—Sale with notice of adverse claims - - - 86  
See BAILMENT.

**EVIDENCE** - - - 224  
See PRACTICE. 9.  
— Appeal - - - 419  
See BILL OF SALE. 2.

— Bankruptcy - - - 580  
See BANKRUPTCY. 7.

— Interruption of easement - - - 462  
See EASEMENT. 2.

**EXAMINATION**—Witness in winding-up—Appeal by witness - - - 118  
See COMPANY. 1.

**EXECUTOR**—Bankruptcy of—Conduct of action  
See PRACTICE. 4. [61

**FELON**—Bankruptcy - - - 1  
See BANKRUPTCY. 1.

**FICTITIOUS SALE**—Railway company - 478  
See RAILWAY COMPANY. 1.

**FORECLOSURE** - - - 49  
See MORTGAGE. 2.

— Action for—Statute of Limitations - 539  
See LIMITATIONS, STATUTE OF. 2.

**FORESHORE** - - - 22  
See EASEMENT. 1.

“**FORTHWITH**”—Notice of appeal - 169  
See BANKRUPTCY. 3.

**FRAUDS, STATUTE OF**—Agreement for lease  
See LEASE. [233

**FRAUDULENT APPOINTMENT** - - - 492  
See POWER.

**FRAUDULENT REFERENCE** - - - 580  
See BANKRUPTCY. 7.

**FRAUDULENT SETTLEMENT**—13 Eliz. c. 5 588  
See BANKRUPTCY. 13.

**FRIENDLY SOCIETY**—38 & 39 Vict. c. 60—*Powers of Investment*—*Illegal Loan*.] The trustees of a friendly society lent out of the surplus funds of the society a sum of £300 to *A.* on the security of a joint and several promissory note made by *A.*, and by *B.* and *C.* as his sureties. None of the makers was a member of the society. *C.* having died, the trustees claimed to prove against his estate on the note:—*Held*, by *Fry, J.*,

**FRIENDLY SOCIETY—continued.**

that the loan on personal security to a person not a member of the society was forbidden by the *Friendly Societies Act*, that the transaction therefore was illegal, and that as *C.* had not received any money of the society, and the society had no claim against his estate except under the contract, the proof must be rejected.—*Held*, on appeal, that as it was not alleged that the money was borrowed for an illegal purpose, the contract was not illegal, but merely unauthorized; that it was not competent to the makers of the note to allege by way of defence that the payee had no authority to lend the money, and that the proof, therefore, must be admitted. *In re COLTMAN. COLTMAN v. COLTMAN* - - - **C. A. 64**

**FURTHER CONSIDERATION**—Report of official referee - - - **644**  
See **PRACTICE**. 13.

**GARNISHEE ORDER** - - - **508**  
See **PRACTICE**. 10.

**GENERAL RULES**, Hil. Term, 1853, r. 169 **58**  
See **ARBITRATION**. 2.

**GIFT BY INFANT** - - - **603**  
See **INFANT**. 1.

**GOODWILL**—Sale of—Rights of Purchaser of—From Vendor personally—From Trustees in Bankruptcy—Solicitation of old Customers.] The rule of *Labouchere v. Dawson* (Law Rep. 13 Eq. 322), by which, in the case of a voluntary sale the vendor of the goodwill of a business is precluded from afterwards soliciting the former customers of that business, cannot be extended to the case of a compulsory alienation. The obligation enforced by the rule is purely personal, and not a mere incident to the transfer of property. Therefore the purchaser of the goodwill of a business from a trustee in bankruptcy or liquidation has no right to restrain the bankrupt or liquidating debtor from setting up *bonâ fide* a fresh business and soliciting the customers of his former business, and it is immaterial whether the bankrupt has or has not joined in the conveyance of the goodwill to the purchaser.—Per *Lindley and Lush, L.J.J.*: The case of *Labouchere v. Dawson* is still applicable to the case of voluntary sales.—The decision in that case questioned by *Baggallay, L.J.*—*Crutwell v. Lye* (17 Ves. 335) followed. *WALKER v. MOTTRAM* - - - **C. A. 355**

**GUARANTEE**—Directors of railway company  
See **RAILWAY COMPANY**. 1. [478]

**GUARDIAN AD LITEM**—Infant - **460**  
See **PRACTICE**. 17.

**HIRING ROOMS**—Mortmain - - **156**  
See **CHARITY**.

**HUSBAND AND WIFE**—Married Woman—Restraint on Anticipation—Gift of mixed Residue—Income-producing Fund.] Gift by a testatrix of real and personal estate to trustees upon trust to convert and invest, and to stand possessed of the stocks, funds, and securities representing the same in trust for her children who, being male, attained twenty-one, or, being female, attained that age or married under that age; with a declaration that

**HUSBAND AND WIFE—continued.**

the shares of daughters should be for their sole and separate use without power of anticipation. Power was given to the trustees, upon the marriage of any of the daughters, to revoke the trusts so far as related to the share of any daughter so marrying, and to settle the same for the benefit of the daughter and her issue as to the trustees should seem fit.—The residuary estate was represented by a sum of cash and certain leasehold houses.—*Held*, that, the gift being of an income-producing fund with a restraint upon anticipation, the trustees could not pay to the daughters during coverture their shares upon their separate receipt. *In re BENTON. SMITH v. SMITH* - - - **277**

—Form of settlement—Limitation to wife's next of kin - - - **47**  
See **SETTLEMENT**. 1.

**ILLEGALITY**—Friendly society—Loan—Investment - - - **64**  
See **FRIENDLY SOCIETY**.

**INFANT**—Gift of Personal Estate—Influence.] In the absence of proof of the exercise of control or influence on the part of the donee, or of the existence of the relation of guardian and ward between the donee and the donor, a gift of her property within a month before her death by an infant aged twenty, of business habits, firm will, and fully capable of managing her own affairs, to a relative with whom she had been residing from her father's death, for a period of five months until her own death, is not invalid. *TAYLOR v. JOHNSTON* - - - **603**

2. —Maintenance—Allowance beyond Provision made by Will—Trust for Accumulation of Surplus Income—Jurisdiction on Summons.] A testator gave the residue of his estate to trustees, upon trust out of the income to pay an annuity of £220 to his widow, and then to pay to his daughter two yearly sums of £100 for the maintenance and education of her infant son and daughter respectively (by a former marriage), as regarded the son so long as he should be under twenty-five, and as regarded the daughter so long as she should be under twenty-one or unmarried. The residue of the income was to be accumulated during the life of the widow, and on her death the testator, after certain provisions for his son and daughter, directed his trustees to pay £10,000 to his daughter's son on his attaining twenty-five; and to pay to her daughter £10,000 on her attaining twenty-one, or marrying under that age, and in the event of her dying before she should have attained twenty-one or married, the £10,000 was to fall into the residue. And the testator gave the residue of the trust estate equally between his daughter and her two children.—Upon a summons taken out after the testator's death in the matter of and on behalf of the infants, with the consent of the testator's widow (who was seventy-seven years of age), and of their mother and her second husband (so far as they were able to consent), an order was made increasing the allowances for the maintenance and education of the infant son and daughter by £150 and £120 per annum respectively, to be paid out of the



**INFANT**—*continued.*

income of the estate and the accumulations thereof.—But it was ordered that the trustees should hold the interests of the infants respectively under the testator's will as a security for the purpose of recouping to any person entitled thereto such sums of money as would be equivalent to the sums which would have arisen from such part of the income as should be applied in payment of the increased allowances, in case the same, instead of having been so applied, had been accumulated as directed by the will. *In re COLGAN* - - - - - 305

— Appointment of guardian - - - 451  
See PRACTICE. 11.

**INJUNCTION**—Notice against purchasing patented articles - - - 386  
See PATENT. 2.

— Nuisance—Temporary injury - 193  
See NUISANCE.

**INSURANCE COMPANY**—*Petition for Winding up an Assurance Society—Order for Scheme for Reduction of Contracts of Society—Life Assurance Companies Act, 1870, s. 22—Special Referee to prepare Scheme—Rules of Court, 1875, Order XXXVI., r. 34—Special Case for Opinion of the Court—Date at which Scheme to take Effect—Claims which had matured.* The Court of Appeal having discharged an order made for the winding-up of this assurance society on a petition presented for that purpose, and directed that a scheme should be prepared for a reduction of the amounts of the contracts of the society:—*Held*, that the date of the presentation of the petition was the one at which the calculation should be made for settling the scheme:—*Held*, also, that the claims of policy-holders and annuitants which had matured before the date of the presentation of the petition must be paid in full; that annuities payable after that date must be reduced; that participating and non-participating policy-holders current must be reduced *pari passu*; and that all payments in arrear in respect of premiums, including half-premiums left as a charge on the policies, must be paid in full. *In re GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY* 39

**INTEREST**—Mortgage—Foreclosure - 49  
See MORTGAGE. 2.

**INTERLOCUTORY APPLICATION**—Copies of pleadings—Costs - - - 72  
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**INTERPLEADER ORDER**—Bankruptcy—Practice - - - - - 216  
See BANKRUPTCY. 2.

**INTERRUPTION**—Light—Prescription - 462  
See EASEMENT. 2.

**INVENTION**—Prior user - - - 268  
See PATENT. 1.

**INVESTMENT**—Friendly society—Illegal loan  
See FRIENDLY SOCIETY. [64]

**JOINT AND SEPARATE CREDITORS**—Liquidation - - - - - 367  
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**JOINT CREDITORS**—Joint and separate security—Composition - - - 394  
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**JOINT TENANT**—Tenant in common - 492  
See POWER.

**JUDGMENT**—Action against partner in name of firm - - - - - 124  
See PRACTICE. 18.

**JURISDICTION**—Allowance for maintenance of infant—Summons - - - 305  
See INFANT. 2.

— Bankruptcy - - - - - 86  
See BAILMENT.

— Winding-up order - - - - - 77  
See COMPANY. 2.

**JUS TERTII**—Bailment—Estoppel - 86  
See BAILMENT.

**LAPSE**—Death of child in lifetime of father 612  
See WILL. 7.

**LEASE**—*Statute of Frauds—Agreement to grant a Lease—Specific Performance—Ambiguous Contract.* An executory agreement for a lease does not satisfy the *Statute of Frauds*, unless it can be collected from it on what day the term is to begin, and there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion. —*Jacques v. Millar* (6 Ch. D. 153) overruled.—The Plaintiff offered to take a lease of furnaces from the Defendant, conditionally upon his being able to make arrangements with other persons as to ore. A loosely-drawn memorandum was shortly afterwards signed by the parties, substituting certain other rents for the rents mentioned in the letter, which in other respects was to form the basis of the agreement. The Defendant, understanding that the lease was to begin immediately, offered possession to the Plaintiff at once, but the Plaintiff refused to take it, as he had not yet made arrangements for ores, and continued to treat the agreement as conditional on his making those arrangements. Ultimately the parties differed as to the covenants to be inserted in the lease, and the Plaintiff commenced his action for specific performance:—*Held*, although where an agreement is clear the Court must act upon its own view of the construction without regard to the view entertained by the parties, yet where a party has throughout insisted on one construction of an obscure agreement, he cannot get specific performance on the footing of the opposite construction. *MARSHALL v. BERRIDGE* - C. A. 233

**LEASEHOLD**—Disclaimer by trustee in bankruptcy - - - - - 7, 122  
See BANKRUPTCY. 5, 6.

**LEAVE TO SERVE WRIT**—Out of jurisdiction  
See PRACTICE. 17. [460]

**LEGAL ESTATE**—Mortgage—Priority - 207  
See SOLICITOR. 1.

**LICENSE**—Patent - - - - - 268  
See PATENT. 1.

— Public-house—Off-license - - - 258  
See COVENANT. 1.

**LIEN**—Solicitor—Property recovered - 311  
See SOLICITOR. 2.

**LIGHT** - - - - - 462  
See EASEMENT. 2.

— Obstruction of—Temporary obstruction 193  
See NUISANCE.

**LIMITATIONS, STATUTE OF**—(3 & 4 Will. 4, c. 27), s. 34.—*Acknowledgment—Expiration of Twenty Years.*] *T. and J. became entitled in possession to a freehold as tenants in common in 1833. In 1879, persons claiming under J. brought an action for sale or partition. The Defendant, who claimed under T., alleged that T. was in receipt of the rents of the entirety from 1833 to 1864, without accounting, and claimed the benefit of the Statute of Limitations. The parties entered into admissions, which stated that T. received the rents of the entirety from 1833 till his death in 1877, and that T. paid to the solicitors of J.'s mortgagees a moiety of the rents due in November, 1864, and continued to pay to them a moiety of the rents till his death. The admissions did not state, nor was there any evidence, whether T. did or did not account for a moiety of the rents before 1864:—Held, by Malins, V.C., that the acknowledgment by T. of J.'s title, though after twenty years' adverse possession, excluded the operation of the Statute of Limitations, and that the Plaintiffs were entitled to judgment.—Held, by the Court of Appeal, that where a tenant in common has gained by the statute an adverse title to another share of the property, no payment of rent or acknowledgment by him can restore the title which has been extinguished by the statute:—But, held, that the payment of a moiety of the rents to persons claiming under J. from 1864 to 1877, raised a presumption that a similar payment was made previously, and that as the admissions did not negative this inference, the defence on the Statute of Limitations could not be supported:—Held, also, that the Defendant ought not to be allowed to bring forward fresh evidence on the appeal to shew that T. had not accounted for a moiety of the rents prior to 1864. SANDERS v. SANDERS - - - - C. A. 373*

**2. — Mortgage — Foreclosure Action — Recovery of Land—Payment of Principal or Interest by Mortgagor or his Agent—3 & 4 Will. 4, c. 27, ss. 2, 24, 40—1 Vict. c. 28.]** A foreclosure action is an action for the recovery of land, and is therefore not within sect. 40 of 3 & 4 Will. 4, c. 27, but is within sects. 2 and 24, and consequently within the supplementary enactment of 1 Vict. c. 28.—A payment to come within the 1 Vict. c. 28, must be a payment of principal or interest, and must be made by the mortgagor or some person bound to pay principal or interest on his behalf.—So the word "paid" in 3 & 4 Will. 4, c. 27, s. 40, involves by implication the addition of "by the person liable to pay."—A payment of rent made by a tenant of the mortgaged property to the mortgagee in consequence of a notice by the mortgagee requiring the rent to be paid to him is not such a payment.—The principle underlying all the Statutes of Limitations is that a payment to prevent the barring by statute must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom the payment is made.—Judgment of Fry, J., reversed. HARLOCK v. ASHBERRY - - - - C. A. 539

**LIQUIDATION BY ARRANGEMENT**—Close of  
See BANKRUPTCY. 8. [140  
— Transfer to another Court - - - 367  
See BANKRUPTCY. 9.

**LOCUS STANDI OF APPELLANT**—Witness in winding-up - - - 118  
See COMPANY. 1.

**LUNATIC**—Trustee Act - - - 384  
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**MAINTENANCE**—Infant - - - 205  
See INFANT. 2.

**MARRIAGE SETTLEMENT**—Form of settlement  
Limitation to wife's next of kin - 47  
See SETTLEMENT. 1.

**MARRIED WOMAN**—Next friend - - 94  
See PRACTICE. 12.

**MEETING**—Joint and separate creditors—Liquidation - - - 367  
See BANKRUPTCY. 9.

**MINERALS**—Purchase of, by railway company  
See RAILWAY COMPANY. 2. [559

**MORTGAGE**—*Consolidation—Union of Mortgages on different Estates after Assignment of Equity of Redemption of one of them.*] When two mortgages, made by the same mortgagor to different mortgagees on different estates, become united for the first time in one person after the mortgagor has assigned (by way either of sale or mortgage) the equity of redemption of one of them, the owner of the two mortgages cannot consolidate them as against the assignee of the equity of redemption, even though both the mortgages were created before the assignment.—The assignee of an equity of redemption takes it subject to all equities which affect the assignor in respect of it at the date of the assignment, but the possibility that the mortgage may, by virtue of its subsequent union in the same person with a mortgage of another estate made, previously to the assignment, by the same mortgagor to a different mortgagee, become liable to consolidation, is not such an equity.—*White v. Hillacre* (3 Y. & O. Ex. 597) approved and followed.—*Beevor v. Luck* (Law Rep. 4 Eq. 537) disapproved and not followed, on the ground that its authority has been much impaired by the observations made upon it by Lord Chancellor Selborne and Lord Blackburn in *Jennings v. Jordan* (6 App. Cas. 698).—*Vint v. Padget* (2 De G. & J. 611) distinguished. *HARTER v. COLMAN* - - - - 630

**2. — Foreclosure Decree—Computation of Interest subsequent to Certificate.]** When a judgment for foreclosure, obtained by a first mortgagee against subsequent mortgagees and the mortgagor, directs successive redemptions, and foreclosures in default of redemption, and a puisne mortgagee fails to pay the amount found due from him to the prior mortgagee for principal, interest, and costs, and is accordingly foreclosed, in taking the account against the person next entitled to redeem, subsequent interest ought to be computed on the whole sum found due from the person who has failed to redeem, i.e., upon the interest found due from him, as well as upon the principal and costs. *ELTON v. CURTEIS* - - - 49

— Covenant by surety to pay premiums on policy - - - 615  
See PRINCIPAL AND SURETY.

— Lease of partnership premises - 105  
See BANKRUPTCY. 11.



**MORTGAGE**—*continued*.

—Priority—Notice - - - 17  
*See PRACTICE. 1.*

—Solicitor and client - - - 207  
*See SOLICITOR. 1.*

—Statute of Limitations - - - 539  
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**MORTMAIN** - - - 156  
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**MOTION**—To discharge order in Chambers  
*See PRACTICE. 2, 14.* [326, 516]

**NAME**—Gift to persons bearing particular name  
*See WILL. 5.* [520]

**NEXT FRIEND**—Married woman - - - 94  
*See PRACTICE. 12.*

**NEXT OF KIN**—Bequest to—Time of ascertaining class - - - 444  
*See WILL. 3.*

**NOTICE**—Appeal—Cross notice - - - 17  
*See PRACTICE. 1.*

—Appeal—Registrar of County Court  
*See BANKRUPTCY. 3.* [169]

—Assignment of money payable on officer's retirement - - - 17  
*See PRACTICE. 1.*

—Covenant not to sell land for beershop 258  
*See COVENANT. 1.*

—Interruption of easement - - - 462  
*See EASEMENT. 2.*

**NUISANCE**—*Obstruction—Injunction—Cause of Action—Reversioner.*] The Plaintiff was the owner in fee of a cottage; the Defendant owned some land immediately adjoining. The Plaintiff alleged that the Defendant had erected on the Plaintiff's land a hoarding on poles, in order to block out the access of light to a window in the cottage, and thus prevent the acquisition of a prescriptive right to the light, and that the Defendant had in so doing committed a trespass.—The Plaintiff also alleged that the poles and hoarding produced a constant rattling and creaking noise, and thus caused an intolerable nuisance to him and his tenants. The Plaintiff claimed an injunction to restrain the trespass and the nuisance. At the trial it was proved that the cottage was in the occupation of a weekly tenant of the Plaintiff who was not a party to the action. Evidence was given that the poles and hoarding caused a nuisance to the tenant and his family, but there was no evidence of any diminution in the value of or other injury to the reversion:—*Held*, that the poles and hoarding were not a structure of such a permanent character as necessarily to injure the reversion, and that, in the absence of any positive evidence of injury to the reversion, the Plaintiff, being only a reversioner, could not maintain the action. *COOPER v. CRABTREE* - - - 193

**OFFICER IN ARMY**—Money payable on retirement—Priority of assignment - - - 17  
*See PRACTICE. 1.*

**OFFICIAL REFEREE**—Report of—Notice to vary - - - 644  
*See PRACTICE. 13.*

**ONUS PROBANDI**—Easement - - - 462  
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**OWNER**—Liability of - - - 281  
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**PARISH RATES**—Winding-up of company—Apportionment - - - 640  
*See APPORTIONMENT.*

**PARTIAL INTEREST**—Contract by vendor to sell entirety - - - 175  
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**PARTIES**—Absence of personal representatives  
*See PRACTICE. 17.* [534]

—Action against partners in name of firm 124  
*See PRACTICE. 18.*

—Demurrer for want of - - - 246  
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**PARTITION SUIT**—*Real Estate—Decree for Sale—Application of Proceeds of Sale—Real and Personal Representatives—Conversion—Partition Act, 1868 (31 & 32 Vict. c. 40), s. 8—Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), ss. 23–25—Settled Estates Act, 1877 (40 & 41 Vict. c. 18), ss. 34–36.*] A decree for the sale of real estate having been made in a partition suit, the property was sold and the proceeds of sale were paid into Court. Three of the persons entitled to shares in the property died intestate before the money was distributed, leaving their father their heir-at-law and sole next of kin. He took out administration to each of them and then died intestate:—*Held*, that the father took his children's shares of the money as their heir-at-law, but that he took them as money, and that on his death they passed to his personal representative, and not to his heir-at-law. *MORDAUNT v. BENWELL* - - - 302

—Sale—Vesting order - - - 646  
*See TRUSTEE ACTS. 2.*

**PARTNERSHIP**—Action against partner in name of firm - - - 124  
*See PRACTICE. 18.*

—Bequest of share of business - - - 432  
*See WILL. 6.*

—Composition with creditors—Joint and separate security - - - 409  
*See BANKRUPTCY. 12.*

—Lease of premises—Mortgage—Proof in bankruptcy - - - 105  
*See BANKRUPTCY. 11.*

**PATENT**—*License to use Invention in the United Kingdom—Prior use of Invention in a British Colony.*] The district of Natal is a British colony with a separate Government, under a Governor appointed by the Crown; and a law has been passed by the Legislative Council of Natal, providing for the granting, in the colony, of patents for inventions:—*Held*, that the validity of letters patent under the Great Seal for license to use an invention in the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, would not be impeached by the fact, if proved, of prior use of the invention in Natal. *ROLLS v. ISAACS* - - - 268

2. — *Slander of Title—Damages—Injunction.*] The holder of a patent, the validity of

**PATENT**—*continued.*

which is not impeached, who issues notices against purchasing certain articles alleging that they are infringements of his patent and threatening legal proceedings against those who purchase them, is not liable to an action for damages by the vendor of those articles for the injury done to the vendor's trade by his issuing them, provided they are issued *bonâ fide* in the belief that the articles complained of are infringements of his patent. Nor is he liable to be restrained by injunction from continuing to issue them until it is proved that they are untrue, so that his further issuing them would not be *bonâ fide*.—Decision of *Jessel, M.R.* (15 Ch. D. 514), affirmed. *HALSEY v. BROTHERHOOD* - - - **C. A. 386**

— Assignment of—Right to account - 246  
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**PAYMENT**—Interest on mortgage—Statute of Limitations - - - 539  
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**PERPETUITY**—Power of sale—Settlement 624  
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**PERSONAL REPRESENTATIVE**—Power to dispense with - - - - 534  
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**PETITION**—Winding-up—Bankrupt contributory - - - - 77  
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**PLAINTIFF**—Adding Plaintiff—Consent - 55  
See PRACTICE. 16.

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— Copy of—Costs - - - - 72  
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**POLICY OF INSURANCE**—Assignment—Payment in absence of representatives of persons insured - - - - 534  
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— Covenant by surety to pay premiums—Right to securities - - - - 615  
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**PORTIONS**—Appointment of, before required—Fraud - - - - 492  
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**POVERTY OF APPELLANT**—Application for security for costs - - - - 84  
See PRACTICE. 3.

**POWER**—Appointment of Portions before required—*Fraud on Power—Discretionary Trust—Joint Tenancy and Tenancy in Common.*] *B. W.*, having a power of appointing portions charged upon real estate for younger children in proportion to the number of such children, and, having only three daughters, aged nine and seven years and one year, appointed £10,000, being the full amount he was entitled to charge, for the portions of his three daughters, to be a vested interest in such children respectively, immediately, but to be paid at such times and in such proportions as he should by deed or will appoint, and in default of appointment to be paid to them share and share alike at

**POWER**—*continued.*

their age of twenty-one years or marriage if after his death, or, if the same should happen during his life, then at his death, with maintenance at the rate of £4 per cent. from his death. One daughter married and attained twenty-one, and on her marriage *B. W.* appointed £5000 to her. The other two daughters died under twenty-one and unmarried. The married daughter assigned to *B. W.* the interest she was supposed to have in the remaining £5000 as surviving joint tenant with her two sisters, and *B. W.* then assigned his interest on his death in the £5000 to the Plaintiff in consideration of £3000, and that assignment contained a covenant on the part of *B. W.*, his executors, administrators, and assigns, for quiet enjoyment:—*Held*, that the appointment by *B. W.* was invalid so far as it directed the portions to vest immediately, that as to the portions of his two deceased daughters who did not live to require them they sank into the estate; that the three children were tenants in common and not joint tenants, that the assignment to *B. W.* by the married daughter was ineffectual and the purchaser from *B. W.* took no portion of the appointed fund:—But, *held*, that the purchaser was entitled, under the covenant for quiet enjoyment in the assignment to him, to prove against the estate of *B. W.* for damages to the amount of £3000, the purchase-money so paid by him and interest thereon. *HENTY v. WREY* [492

**POWER OF INVESTMENT** - - - - 64  
See FRIENDLY SOCIETY.

**POWER OF SALE**—Duration of remoteness 624  
See SETTLEMENT. 2.

**PRACTICE**—Appeal for Costs—Mortgage Suit—Costs of Appeal on Cross Notice—Priority of Charge—Gazetting Retirement of Officer.] After receipt by the army agents of the money payable to an officer on his retirement continual notices of charges on the money were given to the army agents by each of three assignees. One of the assignees brought an action against the two others, claiming priority over them:—*Held*, by *Bacon, V.C.*, that the notices given before the retirement was gazetted were of no avail, and that of the two assignees who gave notice on the day after the retirement was gazetted the Defendant whose security was prior in date had priority over the Plaintiff and over the other Defendant, and that the costs of the action were to be paid out of the fund.—The Defendant who had obtained priority appealed as to the costs, and the other Defendant gave notice of cross-appeal on the merits:—*Held*, that an appeal would lie from the order as to costs. Order as to priority affirmed, but the costs of action ordered to be added to the securities. Appellant's costs of appeal to be paid in moieties by the Respondents. *JOHNSTONE v. COX* **C. A. 17**

2. — Appeal from Judge's Order in Chambers—Summons.] A party desiring to appeal from an order made by the Judge in Chambers on a summons which has not been adjourned into Court for argument or judgment, should move in Court, on notice, to discharge the order, so as to afford the Judge an opportunity of stating, for the information of the Court of Appeal, his reasons for his decision. *HOLLOWAY v. CHESTON* - 516



**PRACTICE—continued.**

3. — *Appeal—Security for Costs—Poverty of Appellant—Rules of Court, 1875, Order LVIII., r. 15.*] The fact that an appellant would be unable through poverty to pay the costs of the respondent if the appeal should be unsuccessful is in itself sufficient ground for requiring security for costs. *HARLOCK v. ASHBERRY* — **C. A. 84**

4. — *Conduct of Proceedings—Administration Actions—Receiver—Bankrupt Administrator.*] An action was commenced in the Court of one of the Vice-Chancellors for the administration of the estate of a testator, against the administrator with the will annexed. The administrator, being interested in that capacity in the estate of another testator, commenced an action for the administration of his estate in the Court of a different Vice-Chancellor, and then became bankrupt. The Plaintiff in the first suit moved in that suit that a receiver of the estate might be appointed, and that the Plaintiff might be permitted to prosecute the second action in the name of the administrator.—*Held*, that the Plaintiff was entitled to the order asked for, and that it was properly made in the Court to which the first action was attached.—In such a case it is not the modern practice to permit the receiver to carry on an action in the name of a bankrupt executor or administrator. *In re HOPKINS. DOWD v. HAWTIN* — **C. A. 61**

5. — *Costs—Administration Action—Real and Personal Estate—Inquiries as to Real Estate—Apportionment of Costs.*] It is the now settled practice of the Chancery Division that the costs of an administration action so far as they have been increased by the administration of the real estate are to be borne by that real estate.—An action was brought by the heir-at-law of a testatrix who had given by will certain legacies, but had died intestate as to her real estate and residuary personalty, for the administration of her real and personal estate:—*Held*, by *Fry, J.*, that the entire costs of the action were payable primarily out of the residuary personal estate:—*Held*, by the Court of Appeal, varying the order of *Fry, J.*, that the costs of the action, so far as they had been increased by the administration of the real estate, must be borne by the real estate.—*Per Jessel, M.R.*: When an estate is insufficient the Plaintiff does not necessarily get his costs in priority to the Defendants. *In re MIDDLETON. THOMPSON v. HARRIS* — — — **C. A. 552**

6. — *Costs—Copies of Pleadings on Interlocutory Application—Rules of Supreme Court (Costs), August, 1875, r. 26.*] An order had been made by the Court of Appeal on the application of the Defendants directing part of an affidavit to be struck out as scandalous and giving the Defendants the costs of the application. Among the items in the bill of costs of the Defendants were charges for four copies of the pleadings, one for the use of counsel and three for the use of the Judges of the Court of Appeal. The Taxing Master, without entering into the consideration of the question whether the copies were necessary for the purpose of the application, disallowed them on the ground that it was the general rule not to allow the costs of copies of pleadings on an interlocutory application:—*Held*, by the Court of Appeal, that no such general rule as was alleged

**PRACTICE—continued.**

to exist in the Taxing Master's office could be sustained; that it was the duty of the Taxing Master, under the Rules of the Supreme Court (Costs), rule 26, to consider in each case whether the copies were "necessary or proper for the attainment of justice," and that as the copies in the present case were necessary for the hearing of the application, the costs of them must be allowed. *WARNER v. MOSSES* — — — **C. A. 72**

7. — *Costs—Short-hand Notes of Evidence.*] The rule is now well settled that the costs of short-hand writer's notes of evidence will not be allowed on taxation unless a direction to that effect has been inserted in the order; for which special application must be made at the hearing. And such a direction will only be inserted in exceptional cases, the Judge's notes, supplemented by those of counsel, being in general a sufficient record of the evidence. *EARL DE LA WARR v. MILES* — — — **C. A. 80**

8. — *Counter-claim—"Connected with the original Cause or Matter"—Third Party—Judicature Act, 1873, s. 24, sub-s. 3; Rules of Court, 1875, Order XVI., r. 17.*] An action asking relief as in detinue was brought against a sole Defendant, who had seized goods which *B.* had assigned to the Plaintiff under a bill of sale.—The sole Defendant filed a statement of defence and a counter-claim impeaching the *bona fides* of the Plaintiff's bill of sale, and alleging a bill of sale by *B.* to himself, and by such counter-claim claimed, (1) relief against the Plaintiff, and (2) as against *B.* the money due under the bill of sale from *B.* to himself, and damages for the alleged fraud. The counter-claim against the Plaintiff was abandoned at the hearing:—*Held*, that the relief asked by the Defendant against *B.* was not a matter sufficiently "relating to or connected with the original cause or matter" to be the subject of a claim under sect. 24 of the *Judicature Act, 1873*. *BARBER v. BLAIBERG* — — — **473**

9. — *Evidence de bene esse in old Suit.*] In 1815 some customary tenants of a manor filed their bill on behalf of themselves and all other the customary tenants to establish their right to work minerals under their tenements without the consent of the lord. A commission was taken out in the same year to examine certain old persons *de bene esse*, and they were examined. After this the suit abated, was revived, and answers were put in in 1819, after which nothing further was done. In 1871 a bill of the same nature was filed by customary tenants, who did not derive title under any of the persons named as plaintiffs in the suit of 1815.—*Held*, by *Hall, V.C.*, and by the Court of Appeal, that the evidence taken *de bene esse* in the former suit was admissible on behalf of the Plaintiffs in the later suit, the issue in the two suits being the same, and there being privity of estate between the parties to the two suits respectively. *LLANOVER v. HOMFRAY. PHILLIPS v. LLANOVER* — — — **C. A. 224**

10. — *Garnishee Order—Vendor and Purchaser—Railway Company—Verdict by Jury—Statutory Contract—Specific Performance—Purchase-money—"Debt due or accruing in hands of Garnishee"—Conditional Debt—Lands Clauses Consolidation Act, 1845, ss. 49, 50—Rules of*

**PRACTICE—continued.**

*Court, 1875, Order XLV., rr. 3, 8.]* A "debt due or accruing" to a judgment debtor and therefore capable of being attached by a garnishee order under Rules of Court, 1875, Order XLV., r. 3, must be an absolute and not merely a conditional debt. —Thus, where, after notice to treat by a railway company to a landowner, the purchase-money has been fixed by the verdict of a jury and judgment of the sheriff under sects. 40 and 50 of the *Lands Clauses Act*, the purchase-money cannot be attached by a garnishee order *nisi* served upon the company by a judgment creditor of the landowner after the verdict but before the execution or tender of a conveyance; for the proceedings under the above sections do not of themselves create an absolute debt due from the company to the landowner, his right to the purchase-money being conditional upon the execution or tender of a conveyance. —Accordingly, in a case where the landowner has brought an action and obtained judgment against the company for specific performance of the statutory contract:—*Held*, that the purchase-money could not be attached by garnishee orders *nisi* served upon the company, some before and others after the commencement of the action, notwithstanding that a good title had been shewn; nor even by a garnishee order served after the execution of the conveyance when the money had been paid into Court by the company under the judgment, the money not being "a debt in the hands" of the garnishee within rule 3 of Order XLV. —The provisions of rule 8 of Order XLV., as to payment or execution being a valid discharge to the garnishee, are inapplicable to a debt due from the judgment debtor that is conditional only. *HOWELL v. METROPOLITAN DISTRICT RAILWAY COMPANY 508*

**11. — Infant—Ward of Court—Administration Action, Payment into Court—Summons for Appointment of Guardian.]** In an administration action to which an infant was not a party, moneys were paid in to her separate account:—*Held*, that this was sufficient to constitute the infant a ward of Court. —A summons for the appointment of a guardian to the infant was taken out before the action, and upon the hearing of the summons no order was made, but, upon the suggestion of the Judge, an arrangement was made as to access to the infant. —*Semble*, this was of itself sufficient to constitute the infant a ward of Court. *DE PEREDA v. DE MANCHA - - - 451*

**12. — Next Friend—Married Woman—Authority—Security for Costs.]** An action was commenced in the name of a married woman by her next friend against her husband and the trustee of a separation deed to enforce payment of an annuity under the deed. The Defendants moved that the action might be dismissed, or that the next friend might be ordered to give security for costs. This was supported by an affidavit of the husband that he believed that his wife had given no authority to commence the action. The husband's solicitors joined in the affidavit, and deposed to the facts that the next friend was not a householder, and had no visible means of paying the costs. The next friend replied by affidavit that he had sufficient means to pay any costs that he might be ordered to pay, but

**PRACTICE—continued.**

said nothing as to his having authority from the married woman to commence the action, and did not produce any authority:—*Held*, by *Bacon, V.C.*, that the next friend of a married woman will not be called upon to prove his authority on the mere allegation of a defendant that he has no authority:—*Held*, also, that the next friend could not be ordered to give security for costs on the ground that he was not a householder when he deposed that he had sufficient means to pay costs. —*Held*, by the Court of Appeal, that the action must be dismissed with costs, to be paid by the solicitors of the next friend, as he, when challenged to shew his authority to commence the action, did not shew any. *SCHJOTT v. SCHJOTT [C. A. 94]*

**13. — Official Referee—Further Consideration—Varying Report.]** Where, in an action which has by the judgment been referred to the official referee and in which further consideration has been adjourned, either party desires to vary the referee's report, he should serve the opposite party with a notice of motion to vary, such notice to be given for the usual motion day. The motion will then be adjourned, as a matter of course, to come on with the further consideration. Where further consideration has not been adjourned, the proceeding to vary may be either a motion or a summons. *BURRARD v. CALISHER - - 644*

**14. — Order in Chambers—Motion to discharge—Time within which such Motion may be brought—Judicature Act, 1873, s. 50—Rules of Court, 1875, Order LVIII., r. 15—Suit to rescind Contract—Auctioneers made Parties—Staying Proceedings.]** A motion to a Judge in Court under the *Judicature Act*, 1873, s. 50, to discharge an order made by him in Chambers may be made at any time within twenty-one days from the drawing up of the order unless the order is simply a refusal of an application, in which case the twenty-one days must be reckoned from the refusal. —The Plaintiff, who had bought property at an auction and paid a deposit to the auctioneers, brought an action against the vendors and the auctioneers to have the contract rescinded, the deposit repaid with interest, the costs of the action paid, and for damages. The statement of claim alleged that all, or nearly all, of the biddings previous to that of the Plaintiff were fictitious, and were either biddings by the vendors or their agents, or were announced by the auctioneer without any bidding having in fact been made. The auctioneers applied for liberty to pay the deposit into Court, and to have the action dismissed against them on such payment being made. The Master of the Rolls made an order that, the vendors undertaking to pay the auctioneers their costs of the auction without prejudice to how they should ultimately be borne, and to pay any interest and damages to which the Plaintiff might be held entitled, and the auctioneers undertaking, in the event of the vendors not carrying out their undertaking, to pay to the Plaintiff interest on the deposit up to the time of payment into Court, and the costs of the action up to and including that application in the event of the Court holding the Plaintiff entitled to such interest and costs, the auctioneers



**PRACTICE—continued.**

should be at liberty to pay the deposit into Court, and that all further proceedings against them should be stayed:—*Held*, on appeal, that the order must be discharged, the auctioneers not having submitted to give the Plaintiff all the relief which he could in any event be entitled to against them, for that if the allegations in the statement of claim were established the Plaintiff would be entitled to have judgment against them for the deposit with interest, and to have an order for costs of the action against all the Defendants. *HEATLEY v. NEWTON* - - - 326

15. — *Demurrer—Want of Parties—Rules of Court, 1875, Order XXVIII., r. 1.* Under the practice established by the Judicature Acts a demurrer for want of parties will not lie. *WERDERMAN v. SOCIÉTÉ GÉNÉRALE D'ÉLECTRICITÉ*

[C. A. 246]

16. — *Parties—Adding Plaintiff—Consent—Rules of Court, 1875, Order XVI. r. 13.* The consent which Order XVI., rule 13 (Rules of Court, 1875), requires to be given by a person whom it is proposed to add as Plaintiff need not be writing; it is sufficient if the solicitor for the existing Plaintiff states that he consents on behalf of the proposed new Plaintiff, the solicitor taking the ordinary responsibility of using a Plaintiff's name. *COX v. JAMES* - - - 55

17. — *Parties—Assignment of Policy of Insurance—Absence of Personal Representative of Person insured—15 & 16 Vict. c. 86, s. 44.* In an action by an equitable mortgagee of a policy of insurance against the insurance company for payment of the policy money the Court has jurisdiction under the 44th section of the 15 & 16 Vict. c. 86, to dispense with a legal personal representative of the assured where none exists.—In a case where the mortgage debt was larger than the policy money, and the estate of the assured was insolvent:—*Held* (affirming the decision of the Master of the Rolls), that the jurisdiction to dispense with the personal representative was rightly exercised.—*The dicta of James and Cotton, L.JJ., in Webster v. British Empire Mutual Life Assurance Company* (15 Ch. D. 169) commented on. *CURTIS v. CALEDONIAN FIRE AND LIFE INSURANCE COMPANY* - - - C. A. 534

18. — *Service—Action against Partners in Name of Firm—Firm dissolved before Writ issued—Service on one Member of Firm—Judgment by Default—Debtor's Summons against Member not served with Writ—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 7—Rules of Court, 1875, Order IX., r. 6; Order XII., r. 12; Order XVI., r. 10; Order XLII., r. 8.* Per Lord Selborne, L.C.: Whether the provision of Order XVI., rule 10, that partners may be sued in the name of their firm, applies, not only to a partnership existing at the time when the writ is issued, but also to a partnership dissolved before the issue of the writ in respect of a cause of action which arose during its existence, *quære*.—But, if it does, still judgment in the action is not *per se* binding on any member of the dissolved firm who has not been served with the writ as a partner, or has not admitted on the pleadings that he is or has been adjudged to be a partner. Leave ought not to be given to issue execution on the judgment against such a person,

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**PRACTICE—continued.**

if he disputes his liability, without the previous determination of the question of his liability; nor can a debtor's summons be properly issued against him on the judgment *per se*.—*Per Cotton, L.J.*: Order XVI., rule 10, applies only to a partnership existing at the time when the writ is issued. It does not apply to a partnership dissolved before the issue of the writ.—*Per Brett, L.J.*: Order XVI., rule 10, authorizes the suing in the name of their firm the members of a partnership dissolved before the issue of the writ, in respect of a cause of action which arose during the existence of the firm, and service of the writ on one of the former partners is, under rule 6 of Order IX., a good service on the others; and a judgment obtained after such a service only is binding on a former partner who has not admitted that he is nor has been adjudged to be a partner, so that a debtor's summons can properly issue on the judgment, though execution cannot issue without the leave of the Court.—A partnership consisting of several members was dissolved as to one of them on the 17th of December, and the business was thenceforth continued by the others under the old firm name, and at the old place of business. On the 18th of December a creditor of the old partnership, who was ignorant of the dissolution, commenced an action against the partners (suing them in the firm name) in respect of the debt contracted before the dissolution. On the 21st of December the writ was served personally on one of the continuing partners. The retired partner was not served in any way. No appearance was entered to the writ, and on the 29th of December the Plaintiff signed judgment by default. Execution was issued, but the sheriff found no goods of the partnership upon which to levy. No application was made under rule 8 of Order XLII. for leave to issue execution against the retired partner. In the following May, the retired partner having had no previous notice of the action, the Plaintiff served him with particulars of demand of the judgment debt, and, he not having paid it, the Plaintiff served him with a debtor's summons founded on the judgment debt. He denied the debt, and applied to the Bankruptcy Court to dismiss the summons:—*Held*, by Lord Selborne, L.C., and Cotton, L.J. (*dissentiente Brett, L.J.*), that the judgment would not support the debtor's summons, and that the summons must be dismissed. *Ex parte YOUNG. In re YOUNG* C. A. 124

19. — *Service out of Jurisdiction—Leave to issue—Leave to serve—Rules of Court, 1875, Orders II., r. 4, and XI., rr. 1 and 3.* Applications for leave to issue a writ for service out of the jurisdiction, and for leave to serve out of the jurisdiction the writ when issued, should be made in Chambers; and such applications may be made either simultaneously or separately.—Evidence is only requisite upon the application for leave to serve. If the applications are simultaneous, the affidavit in support of the application for leave to serve should be intitled in the matter of the intended action, if separate, in the action.—Statement of the practice.—*Young v. Brassey* (1 Ch. D. 277) not followed. *STIGAND v. STIGAND* - - - 460

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**PRINCIPAL AND SURETY—Mortgage of Premises and Policy—Proviso for Redemption—Surety, Covenant by, to pay Interest and Premiums—Subsequent Advances by Mortgagee—Payment of Interest and Premiums by Surety—Right of Surety to a Transfer of the Securities.]** In December, 1854, *S.* assigned certain premises and a policy of assurance to secure the repayment of a sum of £200 advanced to him by *W.*, and interest. The proviso for redemption was that on payment of the money *W.* would reassign the premises and policy unto *S.*, his executors, administrators, or assigns, or as he or they should direct. *F.*, by the same indenture, as surety, covenanted, for himself only, with *W.* that while the £200 or any part should remain owing he would pay the interest and premiums, and he also assigned a policy on his own life, and covenanted to pay the premiums. *W.* at four different periods between May, 1856, and May, 1866, advanced moneys amounting to £530 to *S.* on the security of the same premises. *S.* made default in the payment of interest. *W.* died in 1878, and his executors made a demand upon *F.* for all arrears, which he paid, and he also paid the premiums on the policy of *S.* :—*Held*, that *F.* was entitled to have a transfer of all the securities on paying what was due upon the mortgage of December, 1854.—*Williams v. Owen* (13 Sim. 597) not followed.—*Newton v. Chorlton* (10 Hare, 646) followed. **FORBES v. JACKSON** - - - 615

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**RAILWAY COMPANY—Borrowing—Fictitious Sale—Ultra Vires—Security on Rolling Stock—Guarantee.]** A railway company being in want of money, and being advised that they had no power to borrow, sold part of their rolling stock to a wagon company for £30,000, at the same time making a contract with the wagon company for the hire of this rolling stock at a rent which would repay the £30,000 and interest in five years. At the same time three of the directors of the railway company guaranteed to the wagon company the payment of the rent.—The wagon company brought an action against the sureties and the railway company for rent due :—*Held*, that on the evidence the alleged sale and hiring was in fact a borrowing of £30,000 on the security of the rolling stock; that this was an illegal and void transaction under 7 & 8 Vict. c. 85, s. 19, and 30 & 31 Vict. c. 127, s. 4; and that this defence was available both in law and in equity :—*Held*, nevertheless, that the guarantee was valid, and that the sureties were liable under it.—*Ex parte Williamson* (Law Rep. 5 Ch. 309) observed upon. **YORKSHIRE RAILWAY WAGON COMPANY v. MACLURE** - - - 478

2. — **Compulsory Purchase of Minerals—Subsequent Purchase of Minerals under Lands previously acquired—“Expressly purchased”—Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), ss. 6, 16, et seq.—Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 6, 77, 78, 79.]** A railway company having the usual power to purchase lands under its special Act has, by virtue of the 6th section of the *Lands Clauses Act, 1845*, power also to purchase the minerals under those lands compulsorily at any time before the expiration of the time limited for the exercise of its compulsory powers, if it should deem it advisable.—That power is not taken away by the 77th and following sections of the *Railways Clauses Act, 1845*, which are for the benefit not of the mine owner but of the company, and only exempt the company from the obligation of buying the minerals at once together with the surface lands.—The words “expressly purchased” in the 77th section are not to be confined to “purchased by agreement.”—There is no distinction between the severance of ownership vertically, that is, of the surface lands from the mines beneath, and the severance of ownership laterally by the taking by successive purchases of surface lands from the same landowner. So a railway company having already acquired surface lands may subsequently purchase compulsorily the minerals under those lands.—The opinion of the company's engineer, if *bonâ fide*, is the only evidence required by the Court as to the necessity or propriety of any purchase, and the *onus* of proving want of *bonâ fides* rests upon the party opposing the purchase :—Injunction granted against the company by *Hall, V.C.*, discharged. **ERRINGTON v. METROPOLITAN DISTRICT RAILWAY COMPANY** - - - **C. A. 559**

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- SETTLEMENT**—*Marriage Settlement of Wife's Property—Testamentary Power in Wife—Gift to Next of Kin of Wife in default of Appointment—Power of Revocation.*] By a marriage settlement the wife's property was settled, after life estates in husband and wife, and in default of children in the event of the wife surviving, on her, and in the event of the husband surviving, as the wife should by will appoint, and in default on her next of kin excluding the husband:—*Held*, that the trust in favour of the next of kin could not be revoked, and that the husband and wife together were not entitled to the corpus of the settled property.—*Paul v. Paul* (15 Ch. D. 580) not followed.  
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2. — *Power of Sale—Duration—Determination—Intention of Settlor—Remoteness.*] A power



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given to the trustees of a settlement or will to sell land comprised in it can be exercised by them after the property has, under the trusts, become absolutely vested in persons who are *sui juris*, if on the construction of the instrument it appears to be the intention of the settlor or testator that it should be then exercised, provided that the power in its creation was not obnoxious to the rule against perpetuities, and that the *cestuis que trustent* have not put an end to the trusts by electing to take the property as it stands. *In re COTTON'S TRUSTEES AND THE SCHOOL BOARD FOR LONDON* - - - - - 624

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**SOLICITOR**—Constructive Trust—Solicitor receiving Money to invest on a Specified Security—Legal Estate—Tacking—Priority.] The owner of a copyhold, which was subject to a mortgage by conditional surrender for £350, made by a former owner, instructed S., his solicitor, to procure him, on the security of the property, a loan of £550, out of which the old mortgage was to be paid off. S., in July, 1876, obtained the money from the Plaintiff, who was also his client. In July, 1877, S. took a security for £700 on the property in his own name, the mortgagee assigning the old mortgage debt, and the mortgagor covenanting to surrender. The old mortgagee was paid by a cheque drawn by S. on B. & Co., his bankers. S.'s account was already overdrawn, but on the same day he applied to them for leave further to overdraw, which was granted on his depositing with them the security for £700, and the cheque when presented was honoured. B. & Co. had no notice of the Plaintiff's claim. Some time after this S. put his account in credit, but it shortly afterwards became again overdrawn. S. handed over some of the other muniments of title to the Plaintiff. The Plaintiff commenced his action to establish his right to rank as incumbrancer for £550 in priority to B. & Co. After this, B. & Co. procured the old mortgagee to be admitted under the old conditional surrender, and to surrender to them:—*Held*, by Malins, V.C., that after the account of S. with B. & Co. had once been put in credit, their security must, as against other incumbrances on the property, be taken to have been discharged, and that the Plaintiff was entitled to priority over B. & Co.—B. & Co. appealed, asking for priority over the Plaintiff to the extent of the old mortgage which had been paid off with their money:—*Held*, by the Court of Appeal, that S., having received money from the Plaintiff for the purpose of being invested on a mortgage of specified property, and having taken a security on that property in his own name, was a trustee of that security for the Plaintiff to the extent of the money received from him, and that this equitable

**SOLICITOR**—*continued*.

title must prevail against the deposit with B. & Co., and that the £350 mortgage could not be set up against the Plaintiff:—*Held*, also, that B. & Co. did not acquire priority by having got the legal estate, for that an equitable incumbrancer cannot, after receiving notice of a prior incumbrance, obtain priority over it by getting in a legal estate from a bare trustee. *HARPHAM v. SHACKLOCK*

[C. A. 207]

2. — *Lien for—Costs—Charging Order*—“Property recovered or preserved”—23 & 24 Vict. c. 127, s. 28.] An undischarged bankrupt, without the knowledge of the trustee in his bankruptcy, brought an action, claiming (*inter alia*) remuneration for services rendered by him as an architect to the Defendant, and damages for wrongful dismissal. The Defendant, without admitting any legal liability to the Plaintiff, paid £360 into Court. The Plaintiff took out a summons to have the money paid out to him, but before the summons was heard the action came to the knowledge of the trustee, and he obtained an order joining him as co-Plaintiff in the action, on the ground that the remuneration and damages claimed were his property. The bankrupt's solicitor then applied for a charging order on the £360 in respect of his costs, charges, and expenses of or in reference to the action:—*Held* (reversing the decision of Fry, J.), that the bankrupt's solicitor was entitled to a charging order for his costs up to the time of the intervention of the trustee. —When the Court makes an order under the *Solicitors' Act* (23 & 24 Vict. c. 127), s. 28, declaring a solicitor entitled to a charge upon the property recovered or preserved in an action, it is the duty of the Judge to limit the order to costs properly incurred in recovering or preserving the property.—Money paid into Court by a defendant, although accompanied by a defence denying legal liability, may be taken out of Court by the plaintiff; and is, therefore, property “recovered or preserved” within the 28th section of the *Solicitors' Act*.—*Berdan v. Greenwood* (3 Ex. D. 251) followed. *EMDEN v. CARTE* - - - 311

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<b>SUPPORT</b> —Ancient Buildings—Right of Support from Buildings—Rebuilding Tenement—Damage to Neighbour's Vault—Estate of Ecclesiastical Corporation—Prescription Act—Owner and Contractor jointly responsible.] Where ancient buildings belonging to different owners adjoin each other there is a right of support from the building as well as from the land; and this right of support can be claimed under the provisions of the Prescription Act (2 & 3 Will. 4, c. 71). The mere fact that the support is derived from property which belongs to an ecclesiastical corporation does not prevent the right of support being acquired under the Act. But the enjoyment of right must have been open and not surreptitious to come within the provisions of the Act. Damage having been done by the wrongful acts of a contractor or his workmen, employed under a contract and specification, to a neighbour's vault, it was held, under the circumstances, that both the employer and contractor were liable for it, and judgment was given for the Plaintiff, with costs against both Defendants. <i>LEMAITRE v. DAVIS</i>		[281]
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- TRUSTEE ACTS**—Lunatic Trustee—Trustee Act, 1850, s. 5—*Order vesting Right to Stock in the other Trustees.*] One of three trustees of a sum of stock had been found lunatic. The fund having become divisible, a petition intituled both in Lunacy and in Chancery was presented for the appointment of a new trustee and a vesting order:—*Held*, that the appointment of a new trustee was unnecessary, and that the petition ought to be intituled in Lunacy only. Order made vesting the right to call for a transfer of and to transfer the stock in the two trustees who were not under disability.—*In re Nash* (16 Ch. D. 503) not followed. *In re WATSON* - C. A. 384
2. — *Partition Action*—Sale—Parties not under Disability—Vesting Order—Appointing Person to convey—*Partition Acts*, 1868 and 1876—*Trustee Extension Act*, 1852 (15 & 16 Vict. c. 55), s. 1.] Sect. 1 of the *Trustee Extension Act*, 1852 (15 & 16 Vict. c. 55), applies to sales under the *Partition Acts*, 1868 and 1876, and is not limited to cases of persons under disability. *BECKETT v. SUTTON* - - - 646
- ULTRÀ VIRES ACT**—Railway company—Sale of rolling stock - - - 478  
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- VENDOR AND PURCHASER**—*Specific Performance*—Contract by Vendor having only partial Interest to sell the Entirety—Remedy of Purchaser.] By a memorandum in writing, Defendant agreed to let, the Plaintiffs agreed to take, business premises for one year, with an option for Plaintiffs at the end of the year to have a lease for seven, fourteen or twenty-one years. Plaintiffs, having gone into possession under the agreement, and having laid out money in alterations, at the end of the year gave notice of their intention to exercise the option; but when the Defendant's title came to be investigated it was found that she was possessed of only a moiety of the premises, the other moiety being vested in her son, a minor. The Defendant was decreed to perform specifically so much of the contract as she was able to perform, with an abatement of one moiety of the rent. An inquiry as to damages was refused, there being no evidence that the Plaintiffs had sustained any damage. *BURROW v. SCAMMELL* [175  
— Attachment of purchase-money - 508  
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- VESTING ORDER**—Lunatic trustee - 384  
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See BANKRUPTCY. 13.
- WARD OF COURT** - - - 451  
See PRACTICE. 11.
- WILL**—Absolute Interest—Gift over on Death—Death between Date of Will and Death of Testator—Substitutional Gift.] A testator bequeathed his residuary personalty to trustees in trust for the children of L., to be divided equally between them, and directed that, "In case of the decease of either of them leaving a family, then such share as the parents would have taken shall be equally divided amongst the children of such deceased parents":—*Held*, that "decease" meant decease during the testator's life—that the children of L. who survived the testator took absolutely—and that the children of one child of L., who died between the date of the will and the death of the testator, took the share which this parent would have taken. *In re HAYWARD*. *CREERY v. LINGWOOD* - - - 470
2. — *Annuity*—Life or perpetual—Perpetuities—Ascertainment of Class within prescribed Period.] 1. A testatrix bequeathed an annuity payable out of the rental of certain hereditaments to her sister C. for life, with remainder for life to certain persons, and on their deaths the testatrix directed her executors to pay the annuity out of the said rental to the surviving children of B.:—*Held*, that the children of B. took the annuity for their lives only.—*Evans v. Walker* (3 Ch. D. 211) not followed.—2. The rule against perpetuities requires that not only the extreme limit of the class of persons who may take, but the actual persons who are to take, should be ascertained within the prescribed period.—A testatrix directed property to be sold at a period beyond the limit

**WILL—continued.**

prescribed by the rule against perpetuities and the proceeds to be divided between such of her grandchildren living at the time of the sale in such proportions as testatrix's sister should by will appoint:—*Held*, that an appointment made by a will of the sister before the sale was a bad exercise of the power:—*Held*, also, that, as the class of grandchildren living at the time of the sale could not be ascertained within the prescribed limit, the gift was void for remoteness notwithstanding that the entire class of grandchildren must be ascertained within the prescribed limit. *BLIGHT v. HARTNOLL* - - - 294

3. — *Class—Tenants for Life—Next of Kin* "by virtue of the Statutes" of Distribution—Time of ascertaining Class—Artificial Class.] Where a testator gives property in trust for the benefit of the persons who at a time subsequent to his own death shall by virtue of the Statutes of Distribution be his next of kin, the class is an artificial class to be ascertained on the hypothesis that the testator lives up to and dies at the subsequent period of time. *STURGE AND THE GREAT WESTERN RAILWAY COMPANY* - - - 444

4. — *Cousins — Second Cousins — First Consins once removed.*] A testator, after giving to his sister a life interest in the whole of his property, devised and bequeathed the same after her death upon trust for sale, and to divide the proceeds amongst "my second cousins."—The testator had no "second cousins" either at the date of his will or at his death, or any born afterwards:—*Held*, that first cousins once removed were entitled.—*Slade v. Fooks* (9 Sim. 386) followed. *In re BONNER, TUCKER v. GOOD* - - - 201

5. — *Remoteness—Gift to Descendants bearing a particular Name—Life Estate to Unborn Persons.*] The testatrix, Miss R., had a brother, a widower advanced in life, who had assumed the name of R. G., and had two children, one a bachelor of unsound mind, the other a daughter. By her will she bequeathed a fund to trustees in trust to pay the income to her brother for life, then to his son for life, and from and after the decease of both of them, upon trust to pay the income "for life unto any immediate or direct descendants of my said brother or nephew who shall bear the name of R. G. only, and from and after his or her decease, or in case of failure of any such immediate or direct descendant of my said brother or nephew who shall bear the name of R. G. only," upon trust for certain specified charitable societies. There was a clause for determining the interests of any descendants who after becoming entitled to the receipt of the income should abandon the name of R. G. Before the death of the nephew, a son born after the death of the testatrix, of the daughter of the testatrix's brother, assumed by royal license the name of R. G., and at the decease of the survivor of the brother and nephew there was no other descendant of either of them who bore that name:—*Held*, by *Hall, V.C.*, that the trusts subsequent to the life interests of the brother and nephew were void for remoteness, and that on the determination of those interests the fund fell into the residue.—*Held*, on appeal, that the limitations after the life interests were not void for remoteness:—*Held*, that the

**WILL—continued.**

limitation to descendants was a gift for life to descendants living at the determination of the life interests and bearing the name of R. G. as joint tenants:—*Held*, that the gift was not, as in *Leigh v. Leigh* (15 Ves. 92), confined to persons entitled to the name of R. G. by birth, and that the brother's grandson, as he bore the name of R. G. at the determination of the life interests, was entitled for life, and that on his decease the gift to the charities would take effect. *In re ROBERTS. REFINCTION v. ROBERTS-GAWEN C. A. 520*

6. — *Speaking from Death—Bequest of Income of Share of Partnership Business—Subsequent Acquisition of the entire Business—Wills Act, ss. 23, 24.*] The testator, *William Russell*, by a will, dated in 1857, after reciting that he was carrying on business as an iron manufacturer in partnership with his two brothers, bequeathed all his share and interest of and in the partnership business, and of and in the real and personal estate employed or invested therein, and of and in the partnership debts, securities, and moneys to which he might be entitled at his decease, to trustees, upon trust to continue the business during his wife's life, and to pay to her a sum equal to half the amount drawn out by the two other partners. The wife had a discretion to discontinue the business, and in case the business should be discontinued testator directed the trustees to get in the share then appertaining to his estate in "the said co-partnership trade or business," and, after making good to the wife "one full third share of the profits," invest the same, and pay the income to his wife for life. After the death of the wife, he directed the trustees out of the profits of his said share and interest in the business, if continued, and out of the trust fund, if the business should have been discontinued, to pay certain pecuniary legacies, and subject thereto to hold the fund in trust for A. B.—Testator died in 1881. After the date of the will, he acquired the shares of his two brothers in the partnership and carried on the business still under the firm of "*Russell Brothers*," as sole owner, until his death. A. B. died in the testator's lifetime. The widow had not discontinued the business.—*Held*, that the will operated upon the whole of the testator's interest in the business at his death, and that the widow took the whole of the income for her life. *In re RUSSELL. RUSSELL v. CHELL* - - - 432

7. — *Specific Devise by Father to Child—Death of Child in Lifetime of Father—Devise by Child to Father—Lapse—Wills Act (1 Vict. c. 26), s. 33.*] A father by his will devised a freehold house to a son, and his residuary real estate to trustees in trust for other persons. The son died in his father's lifetime leaving issue living at his father's death, and having by his will devised all his real estate to his father:—*Held*, that as, under the 33rd section of the *Wills Act*, the son must be deemed to have survived the father, the property passed to the son absolutely under his father's will, and became subject to testamentary disposition by the son:—But that as by the will of the son the property was devised to his father, the devise by the son failed, and his heir-at-law was entitled to the property. *In re HENSLEY. JONES v. HENSLEY* - - - 612



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8. — *Survivor—Gift to Children for Life with Remainder to their Children—Dying without Children—“Survivor or Survivors” not construed “other or others.”* Testator gave by will, made in 1834, the residue of his estate to trustees to pay the income, after the death of his wife, unto such of his four named children as should be living at the decease of his wife, during their lives; and after the decease of any one or more of such children who should leave children he gave the share, whether original or accruing, of the one so dying in trust for his or her children; and, in the event of any one of his children dying without leaving children who should attain the age of twenty-one years, then he gave the share, whether original or accruing, of such of them so dying in trust for the survivor or survivors of his said children during their lives, and after their deaths for their respective children, and their heirs, executors, and administrators. There was no gift over. The four children of the testator survived the widow. One child died leaving two children who attained the age of twenty-one years, and the other three children died without issue;—*Held*, that the words “survivor or survivors” must be so read, and not as “other or others.” *In re HORNER’S ESTATE. POMFRET v. GRAHAM* - - 186

9. — *Trustees—Solicitor—Trust Estate.* A direction in a will appointing a particular person solicitor to the trust estate imposes no trust or

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duty on the trustees of the will to continue such person their solicitor in the management and affairs of the estate. *FOSTER v. ELSLEY* - 518

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